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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

THE KANSAS CITY STAR COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

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THE KANSAS CITY STAR COMPANY,

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PETITION FOR A WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

The judgment below relates to the conviction of the petitioner for allegedly monopolizing the dissemination of news and advertising in a four-county area including and surrounding Kansas City, Missouri. That conviction was affirmed by the Court of Appeals for the Eighth Circuit.

This is the first criminal case to be tried under the anti-trust laws that did not involve the charge of conspiracy, but the courts below tried this case as though a conspiracy were charged.

Emil A. Sees, petitioner's Advertising Manager, was tried with petitioner and convicted. His petition for a writ of certiorari is being filed simultaneously herewith.

Opinions Below.

The opinion of the District Court denying defendants' motion to set aside the verdict of guilty and for judgment of acquittal or in the alternative for a new trial is printed at pages 324-29 of the record. The opinion of the Court of Appeals is reported in 240 F. 2d 643 and is printed as Appendix A hereto.

Jurisdiction.

The judgment of the Court of Appeals is dated and was entered on January 23, 1957 and is printed as Appendix B hereto. The petition for rehearing was duly filed on February 11, 1957; the order denying the petition for rehearing is dated March 13, 1957. On April 2, 1957, Mr. Chief Justice Warren extended the time within which to file a petition for a writ of certiorari to and including May 12, 1957.

Jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented.

1. Do the rulings of the courts below constitute a new and dangerous interpretation of the antitrust laws which puts practically every newspaper in the country at the mercy of the Attorney General and constitutes a violation of freedom of the press?

2. Can a defendant be deemed to have monopolized the dissemination of news and advertising in a community where, in fact, powerful and effective competition exists from radio, television, magazines and other media, and where the defendant does not have, and is not claimed to have, any power to control the prices of or exclude competitors from such media?

3. Is the sale of the same advertising by the same newspaper publisher in the morning and in the afternoon issues of a paper distributed to the same subscribers, the sale of two different "products"?

If so, are the two "products" so closely related that a refusal to accept such advertising, except upon a basis that includes an entire day's publication, constitutes a lawful exercise of the rights of a sole trader—and not a tying that violates Section 2 of the Sherman Act?

4. Does the practice of a newspaper publisher in requiring its subscribers to subscribe to both the morning and afternoon issues of one newspaper constitute an illegal tying of two different "products" in violation of Section 2 of the Sherman Act?

5. Did the Trial Court err in charging the jury in a non-conspiracy case that unexerted power was violative of Section 2 of the Sherman Act; that monopoly power was identical with "dominancy" and that dominancy was being "the biggest" in Kansas City; that monopoly power was the power to impose a "handicap" or to secure "a competitive advantage"?

6. Can petitioner's conviction be sustained where

—the Trial Court improperly excluded relevant and material evidence offered by petitioner and improp-

erly admitted irrelevant, immaterial and fatally prejudicial evidence offered by plaintiff;

—the Trial Court improperly charged the jury as to the facts and the law and made fatally prejudicial comments to the jury in its charge;

—there was insufficient evidence to support petitioner's conviction of the offenses charged in the indictment?

Statute and Constitutional Provision Involved.

The statute pertinent to this petition is Section 2 of the Sherman Act, 15 U. S. C. §2, which, at the time of the indictment, read as follows:

> "§2. *Monopolizing trade a misdemeanor; penalty.* Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The Constitutional provision pertinent to this petition is the First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statement.

This case presents questions of vital importance to virtually every newspaper in the United States.

The courts below have established a new and novel principle of single-trader monopolization which places 92% of this nation's newspapers in automatic violation of the Sherman Act. This result was reached by a charge and by rulings that squarely conflict with controlling decisions of this Court.

This was not a restraint-of-trade case in which incidents deemed to restrain competition may in and of themselves constitute the offense. Petitioner was charged with and convicted of monopolization.

That offense, by its very nature, requires, first, a proper determination of the relevant market and, second, a finding that monopoly power—power to exclude competitors and fix prices—exists in that market. Nonetheless, the vast majority of the Government's evidence related not to monopoly power, not to market control, but to individual incidents occurring during a 17-year period.

Such incidents furnish no substitute for the proof required in a monopolization case. If the courts below wrongly determined the market or improperly defined the crime of monopolization, this conviction cannot stand, regardless of the existence or nonexistence of particular incidents.

The charge of the District Court and the rulings of both courts below are also fatally defective in that they made the unit advertising rate—an essential practice utilized by virtually every newspaper in the United States publishing morning and evening issues—a *per se* antitrust violation. The courts below went even further in also con-

demning as a *per se* antitrust violation the use of the unit subscription rate—a practice never heretofore challenged in any court.

The individual incidents which comprised the bulk of the record below are just as irrelevant to these practices as they are to the monopolization issues since, under the District Court's charge, the jury was instructed that it could convict on the basis of either of these practices *alone*, without regard to any other acts of the petitioner (R. 2452-57).

This statement is confined to the facts and rulings pertinent to the questions presented by this petition and the individual incidents are therefore not treated herein.

The jurisdiction of the District Court was invoked under 18 U. S. C. §3231.

I.

The decision below brands as monopolies 92% of the newspapers in the United States and permits their operation only at the sufferance of the Attorney General.

It is in direct conflict with the opinion of this Court in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956).

The application of the monopoly concept to one-newspaper towns

The hard core of this case is its ruling that the Kansas City Star, as the largest daily newspaper in Kansas City, is in a "dominant" position and that therefore, *ipso facto*, it has "monopoly power".

If that is true, then more than 92% of the newspapers in this country are also the possessors of monopoly power,

and everything they do may be deemed a violation of the Sherman Act.

If they increase the size of their plant, campaign for greater circulation, actively solicit additional advertising or extend their business in any way, they may be charged with progressively embracing each new business opportunity.*

Every piece of business secured by them may be regarded as an "appreciable segment" of interstate commerce from which competitors have been "foreclosed".

If that is the law, then newspapers are living on sufferance—at the mercy of the Attorney General, who may proceed against such targets as he may select.

If that is true—then make no mistake about it—freedom of the press is at an end.

The newspaper industry is a unique industry

The number of one-newspaper towns is increasing because the newspapers are caught between the pressure of competition from other media and the rising costs of production (DX 75, 76, R. 3066-68w; R. 2092-93, 2191-96, 2256-57).

In *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 603 (1953),—this Court found that 92% of the newspaper communities in the United States have either one newspaper or a morning and afternoon paper in common ownership.

This Court also found that the newspapers had suffered a "drastic economic decline" (*Id.* at 602).

The defendants offered the same crucial evidence in this case, and the same reasons for that economic decline. But

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* *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 431 (2d Cir. 1945).

that evidence was excluded by the District Court as irrelevant (R. 2092-93, 2196-97, 2256-57).

The field of competition should include not only newspapers but also other media

To consider this case solely from the standpoint of competition between newspapers alone is to refuse to see what everybody knows—namely, that the newspapers are subject to the severest kind of competition, both in advertising and in the dissemination of news, from magazines, radio, television, direct mail advertising and other media which will be referred to below.

These are not negligible competitors. They are as well financed and as well entrenched as the Kansas City Star. It is utterly impossible for the Kansas City Star either to exclude them from the field or to control their prices.

The defendants cannot be denied the right—as was done by the courts below—to show that this effective competition exists, merely because the Government elected to define the field of competition in such a narrow way as to exclude it.

The *Cellophane* case

In the *Cellophane* case, *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956), the Government tried to do the same thing. It charged only a monopoly of cellophane, but this Court held that, in determining the question whether duPont possessed monopoly power, the defendants were entitled to show the existence of competition throughout the whole field of flexible wrapping materials.

This Court also held that it was not necessary that these competing materials be identical or that they possess precisely the same characteristics or that each of them was equally desirable for every use, or that they were sold for the same price.

The question really was whether they were reasonably interchangeable functionally—so that collectively they constituted effective competition with cellophane.

Application of the *Cellophane* case to the newspaper industry

The newspaper sells to the advertiser the attention of the public. But many other mass media are selling the same thing. Indeed they are preferred by a large section of the public as purveyors of news and advertising. Many advertisers use them interchangeably, shifting readily from one medium to another. Evidence of this mobility was offered but excluded (DX 78-82, R. 3079-87; R. 2221-32, 2239-46). Under the doctrine of the *Cellophane* case, all of these media are competing in the same market and cannot be excluded from the field of competition merely because the Government chose to draw its papers that way.

This question of the relevant market is purely a pragmatic factual one. It cannot be decided by the mechanical application of any rule of thumb test. It must be determined by consideration of all of the relevant facts.

Especially in the case of newspapers it is of the highest national interest that this test be applied realistically.

We do not ask to have the press exempted from the antitrust laws. We do ask for an interpretation of the Sherman Act that includes a realistic and sympathetic understanding of the unique nature of the newspaper industry and of the competitive impact of new technologies and other media.

This Court is being called upon to mark the boundaries between two opposing public policies in a peripheral area. The public policy of freedom of the press is at least as much in the interest of the public as the public policy in favor of competition.

We ask that in determining the boundary between these two public policies the Court will not consider narrowly the field of competition, but will seek a true balance of policy in the public interest because of the indispensable function of a free press in a free society.

It should not put every newspaper in the country *in terrorem* of prosecution by whatever administration is in power.

No monopoly power

This is not a "restraint of trade" case under Section 1 of the Sherman Act.

Nor is this a case charging a conspiracy or mere attempt to monopolize.

It is a case charging actual consummation of the substantive offense of monopolization by a sole trader. As such, it is a case squarely presenting "the difficult subject of single-firm monopoly." *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 413 (1956) (concurring opinion of Mr. Justice Frankfurter).

As this Court has repeatedly held, monopoly power is the power to control prices and exclude competition. If effective competition exists, monopoly is impossible.

The indisputable fact is that newspapers are in direct and intense competition with other mass media. Newspapers cannot exclude these other media from the field or control their rates of advertising. The Government utterly failed to show that petitioner could do so.

Competition in news

Today, every citizen in every community, including Kansas City, is bombarded with news from a dozen different media—from the radio in his car, from the television set in his home, from news magazines, from daily

newspapers and from weekly newspapers. No single news disseminator—in fact, no single news disseminating medium—can possibly monopolize his attention (R. 2251-55).

Competition in advertising

The struggle for advertising is, if anything, even fiercer. Each medium, and each competitor within each medium, is engaged in a day-to-day, life-and-death struggle to obtain a share of the advertiser's budget—a struggle in which for years newspapers have been steadily losing ground (DX 78-82, R. 3079-87).

There is no danger that newspapers will overwhelm the competing mass media of magazines, television, radio and many others. There is substantial danger that these competing mass media may drive newspapers to the wall.

The inroads which the other media have made in the newspapers' potential market were noted by this Court in the *Times-Picayune* case:

> "And while newspapers in 1929 garnered 79% of total national advertising expenditures, by 1951 *other mass media had cut newspapers' share down to 34.7%*" (345 U. S. 594, 604). (emphasis supplied)

Competition in news and advertising in Kansas City

The market evidence (much of which was excluded) showed the obvious fact: that the situation in Kansas City was no different from the situation everywhere else in the nation.

Seven daily newspapers, 78 weekly and suburban papers and 132 other magazines and publications located in the four-county area compete with petitioner in disseminating news and advertising (DX 38, 39, R. 2894-2906). Thirteen other dailies and 65 weekly papers compete in the Star's retail trading area (DX 44, 45, R. 2911-27).

Eight radio stations have transmitters located in the four-county area, and the Star's station (WDAF) secures only a small percentage of the radio advertising revenue (21%) and broadcasts only a small portion of the news (13%) disseminated by radio (GX 188, R. 2782-83, DX 53-59, 63-66, 70, 72, R. 2939-51, 2957-60, 3055, 3058-59).

Many other radio stations whose transmitters are located elsewhere effectively serve and disseminate news and advertising in the four-county area (DX 54, 56, 70 (a), 72 (a), 73 (a), R. 2941, 2945, 3056, 3059-60, 3062). Television channels, frozen by FCC order after the Star's television station commenced operation, were unfrozen shortly before the indictment, and two competitive television stations now operate in Kansas City; three additional channels are available for future use (DX 95, R. 3102-06, R. 2328-32, 2401).

Like every other newspaper, the Star must also meet the competition of national magazines, and many other powerful media, such as outdoor advertising and direct mail advertising, on which millions of dollars are annually spent (DX 83-90, 96-104; R. 3089-3101, 3106-45; R. 1826-27, 1871-72).

Exclusion of other media by the lower courts

The Trial Court, however, removed from the jury's consideration the question of the appropriate market by systematically excluding the very evidence which would have enabled the jury to pass upon this question.

National magazines were completely eliminated from the jury's consideration, although the circulation per issue of the leading eighty national magazines in the Kansas City area far exceeded the Star's (DX 83-90, R. 3089-3101; R. 1870-71, 2231-46, 2272).

Radio was read out in large part by the court's exclusion of all radio and television stations competing within the Kansas City area unless their transmitters were physically located within that area (R. 2105-06, 2114-20, 2130-34, 2137, 2142, 2145, 2151-52, 2154-56, 2332-33).

Television was automatically eliminated by the happenstance of the date of the indictment. There are today three television stations thriving in Kansas City. The fact that there was only one at the time of the indictment is not attributable to any action of the Star, but solely to the FCC "freeze" (DX 95, R. 3102-06; R. 2327-32, 2400-01).

Other mass media, such as *outdoor advertising*, were entirely excluded (R. 2364-66).

No evidence was permitted as to the *daily and weekly papers* published within the Star's retail trading area outside the four counties, with which 35% of the Star's circulation competes (DX 44, 45, R. 2911-27; R. 1883-85).

The Government in fact even sought to limit the newspaper field to daily newspapers published in the four counties and to exclude entirely all newspapers not published daily (GX 172, 187, R. 2776, 2781-82; R. 1864-67).

In like vein, the Trial Court excluded all of petitioner's evidence showing the tremendous cross-elasticity of demand between the various competing media—the very factor which this Court viewed as crucial in *Times-Picayune* (DX 78-82, R. 3079-87; R. 2221-32).

Finally, the Trial Court barred petitioner absolutely from even contesting the arbitrary geographical market selected by the Government (R. 1883-85, 2110, 2120-23, 2165-66), although admittedly over a third of petitioner's newspaper circulation and 80% of its radio home coverage lay outside this area (DX 42, 43, 60, 63, R. 2909-10, 2953, 2957).

The Trial Court's action was fully sustained by the Court of Appeals, which held *as a matter of law*—in terms almost diametrically opposed to the language of this Court in *Times-Picayune*, quoted *infra*,—that "radio stations and television stations located outside the metropolitan area herein described, magazines, newsreels, topical books, specialty publications" were not " 'market alternatives' or effective substitutes" and that these various media "were not competitors in the real sense of the word." (Appendix A, pp. 24a-25a).

The court's definition of the market conflicts with the decisions of this Court

In *Times-Picayune*, this Court explicitly stated:

> ". . . their [the newspapers'] quest for advertising linage *encounters the competition of other media, such as radio, television, and magazines.*" (345 U. S. 594 at 600). (emphasis supplied)
>
> "Lower milline rates visualized as a consequence of unit insertions might attract national linage from advertisers utilizing *newspapers in other cities, as well as counteract a national advertisers' trend away from newspapers toward other mass communications media.*" (345 U. S. 594 at 624). (emphasis supplied)

And, in *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 151 (1951), this Court spoke of the competition offered by radio broadcasting to newspapers.

Moreover, as noted above, the narrow restriction of the market which the lower courts imposed is irreconcilable with the Court's ruling in *Cellophane*. The very authorities which the Government cited to the Court of Appeals—after the *Cellophane* decision—were the same authorities which it relied on in *Cellophane* itself. This Court there

swept aside such authorities, pointing out that all those cases dealt with lesser offenses and "were not concerned with the problem [consummated monopolization by a sole trader] that is now before the Court." (351 U. S. at 395, n. 23).

In the *Cellophane* case, this Court further held that, in determining the relevant market:

> "What is called for is an appraisal of the 'cross-elasticity' of demand in the trade. See Note, 54 Col. L. Rev. 580. *The varying circumstances of each case determine the result*" (351 U. S. 377, 394-95). (Emphasis supplied.)

The Trial Court's exclusion of these media *as a matter of law* cannot be squared with *Cellophane.*

In the Report of the Attorney General's National Committee to Study the Antitrust Laws, the Committee noted:

> "The appropriate market is the 'area of effective competition' within which the defendant or defendants operate. 'The problem of defining a market turns on discovering patterns of trade which are followed in practice.' *Identification of markets required for solution of an antitrust problem is primarily one of fact.*" (p. 44) (Emphasis supplied.)

Similarly, the geographic definition of the market is equally a question of fact, which must be determined by the trier of fact. *United States* v. *Columbia Steel Company,* 334 U. S. 495 (1948).

II.

The holding that the use of the unit advertising rate alone constitutes a monopolization in violation of Section 2 of the Sherman Act is in direct conflict with the opinion of this Court in *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953), and with a decision of the Court of Appeals for the Second Circuit in *Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522 (2d Cir. 1956).

It constitutes an unprecedented and dangerous extension of the antitrust laws.

Conflict with other decisions

The decision of the court below holding that the unit rate *per se* violated Section 2 of the Sherman Act is in direct conflict with the decision of this Court in *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953).

It is also in conflict with the decision of the Court of Appeals for the Second Circuit in *Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522, 525 (2d Cir. 1956), and the holding of District Judge Yankwich in *United States* v. *Twentieth Century-Fox Film Corp.*, 137 F. Supp. 78, 84 (S. D. Cal. 1956).

In addition, this decision raises a question of great importance to the newspaper world generally because virtually all newspapers having morning and afternoon issues use unit advertising rates.

The rulings below

The District Court charged the jury that the use of the unit rate alone would allow it to find the defendants guilty

of monopolization of both news and advertising under Section 2 of the Sherman Act:

> "In short, you are instructed that if you find that the defendants used the forced combination arrangement *between two newspapers,* and that the papers or either of them were dominant, and that such practice was intended to achieve or maintain monopoly, then I instruct you that you would be justified *upon that evidence alone* in returning a verdict of guilty." (R. 2456) (emphasis supplied).

The Court of Appeals sustained this charge. (See Appendix A, pp. 21a-22a).

The above-quoted charge was fatally defective and, without more, constituted reversible error for at least two reasons:

1. It charged that, given dominance, the use of the unit rate, in and of itself, could be found to furnish sufficient evidence of both monopolistic action and monopolistic intent and thus, without more, sufficed for conviction.

2. It permitted the jury to find the existence of "two newspapers" on evidence far weaker than that rejected by this Court as a matter of law in *Times-Picayune.*

What the unit advertising rate is

The unit rate in this case is in all material respects identical to the unit rate which was upheld as lawful in *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594 (1953). A newspaper charging a unit rate requires that advertisements must appear in one complete cycle of the morning and evening issues.

The unit rate applied only to classified ads (such as "Lost and Found", etc.) and general advertising (such as

cigarette or automobile ads). *It had no application whatever to local display advertising* (such as department and grocery store ads) (GX 33-71, R. 2571-2707; R. 1846).

Not a monopolistic action nor evidence of monopolistic intent

In *Times-Picayune*, this Court held that the use of the unit rate by a sole trader did not constitute restraint of trade in violation of Section 1 of the Sherman Act, nor an attempt to monopolize under Section 2. *A fortiori*, it cannot, by itself, constitute a consummated monopolization under Section 2 of the Sherman Act.

The unit rate is a normal and usual practice throughout the newspaper industry. As stated by this Court in *Times-Picayune:*

> "At that time [1950] about 180 other publishers, the vast majority of morning-evening owners, had previously instituted similar unit plans." (345 U. S. 594, 623)

The evidence in the present case was to the same effect (DX 30, 77, R. 2873-79, 3068x-78; R. 1811-21, 2078-79, 2199-2200).

Legitimate business aims

There are good and sensible business reasons, from the standpoint of efficiency and better management, for a newspaper with morning and afternoon issues to offer unit advertising rates.

There was uncontradicted evidence that the Star's use of the unit rate since its adoption over fifty years ago was motivated by these reasons (DX 25, 35, R. 2861-65, 2883-89; R. 1791-99, 1830-45). There was no evidence that the Star's

adoption or use of the unit rate was motivated by any monopolistic intent.

The publisher has an interest in this efficient method of operation which is just as legitimate and just as worthy of protection as the interest of the advertiser.

This Court in *Times-Picayune* expressly held that these legitimate business aims justified the use of the unit rate. It said:

> " . . . uncontradicted testimony suggests that unit insertions of classified ads substantially reduce the publisher's overhead costs. • • • Certainly a publisher's steps to rationalize that operation do not bespeak a purposive quest for monopoly or restraint of trade. • • •
>
> " . . . the unit rate was viewed as a competitive weapon in the rivalry for national advertising accounts. Lower milline rates visualized as a consequence of unit insertions might attract national linage from advertisers utilizing newspapers in other cities, as well as counteract a national advertisers' trend away from newspapers toward other mass communications media. In summary, neither unlawful effects nor aims are shown by the record. • • •
>
> "Since we have viewed that step as predominantly motivated by legitimate business aims, this record cannot bear out the specific intent essential to sustain an attempt to monopolize under §2" (345 U. S. 594, 623-24, 627).

The holding of the Court of Appeals for the Second Circuit in *Syracuse Broadcasting Corp.* v. *Newhouse,* 236 F. 2d 522 (2d Cir. 1956), is to the same effect. See also *United States* v. *Twentieth Century-Fox Film Corp.,* 137 F. Supp. 78, 84 (S. D. Cal. 1956).

The Star is a single, around-the-clock newspaper.

Both courts below recognized that the use of the unit rate was lawful if the morning and afternoon issues were two parts of the same paper.

This recognition was compelled by *Times-Picayune*, which makes clear that the sale of exactly the same advertising in the morning and in the afternoon issues of the same newspaper is not the sale of two different products.

The courts below sought to distinguish *Times-Picayune* on the ground that—unlike the Times-Picayune and the States—the morning and afternoon issues of the Star were two separate papers.

The plain fact is, however, that there was far greater basis in the *Times-Picayune* record for the finding of two separate and distinct papers than there was in this case. All the elements relied upon by the Government in this case were equally present and relied upon in *Times-Picayune*. Yet this Court, on appeal, reversed the finding of the lower court, and held as a matter of law that the two issues of the Times-Picayune and the States constituted only one newspaper (345 U. S. 594, 613-14).

Thus, in the instant case, the Government argued that the two issues of the Star were different newspapers because they:

> "carried different mastheads, different news, different editorials, different comics, different syndicated columns, different serials, different local display ads, etc." (Government's Brief to Eighth Circuit, pp. 73-74)

But in *Times-Picayune*, the trial court expressly found that "the evidence establishes beyond question that the defendant corporation publishes two separate and distinct

newspapers", the morning Times-Picayune and the evening States. It further found that:

> "• • • These newspapers are separate and distinct and have always been considered so by defendants. They reach separate groups of readers; are produced at least in part by separate organizations; and have separate news and feature content. Although the editorial policy is identical, the editorial content is different. The two newspapers have an entirely different and distinctive make-up and appearance." (105 F. Supp. 670, 673 (E. D. La. 1952)).

And that "The Times-Picayune and States contain different features, syndicated columns, editorial cartoons, comics, and news" and that it had represented to national advertisers that "the make-up of the States and the Times-Picayune is as different as the New York Times and the New York Journal American . . ." *Ibid.*

In *Times-Picayune*, the District Court also stressed that an executive of the newspaper had pointed out to advertisers that the Times-Picayune and the States were produced by "entirely separate organizations", each with its complete staff, and that there was "actually competition" between them.

In contrast, the Star management has concededly never considered nor represented that the two issues are different papers. The morning issue has the name "The *Morning* Kansas City Star" on the masthead. The two issues are practically identical in appearance. They are published by the same company. They are printed in the same building by the same printing presses, and by substantially the same editors and employees. They have the same bank accounts, and the same advertising solicitors. They constitute for all

purposes an around-the-clock paper. (GX 177, 178, R. 2780; DX 22(a), 23, R. 2855-57; R. 1765-83, 2062, 2347, 2408-09.)

Under such circumstances, as *Times-Picayune* explicitly holds (345 U. S. 594, 614), the tying cases are inapplicable to the unit rate:

> "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market. Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant 'tying' product exists (in fact, since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as 'tying' as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same."

The Court of Appeals for the Second Circuit made an identical holding in *Syracuse Broadcasting Corporation* v. *Newhouse*, 236 F. 2d 522 (2d Cir. 1956), with respect to the morning and evening issues of a newspaper which was the only newspaper in its city.

No substantial effect on competition

In the present case there is no evidence whatever that the unit rate had any substantial effect upon competition.

It is not enough to show that some advertisers might have preferred one issue or the other. The opinion of the lower court in the *Times-Picayune* case showed that some of the advertisers in that case had similar preferences. (105 F. Supp. 670, 676.)

Sellers have rights as well as buyers. The Star had the right to operate in the most economical and efficient manner despite the idiosyncrasies of a few individual advertisers.

No competitor testified against it. No competitor was shown to have been injured by it. This Court held in *Times-Picayune* that "*guilt cannot rest on speculation*" and that the use of the unit rate did not even constitute a restraint of trade under the lower standards required by Section 1 of the Sherman Act—much less monopolization under the more stringent provisions of Section 2. It said at page 622:

> "Under the broad general policy directed by §1 against unreasonable trade restraints, guilt cannot rest on speculation; the Government here has proved neither actual unlawful effects nor facts which radiate a potential for future harm.
>
> "While even otherwise reasonable trade arrangements must fall if conceived to achieve forbidden ends, legitimate business aims predominantly motivated the Publishing Company's adoption of the unit plan."

III

The holding that the unit subscription rate alone constitutes a monopolization in violation of Section 2 of the Sherman Act was wholly lacking in legal and evidentiary support and constitutes reversible error.

This is a question of first impression.

The District Court charged the jury that they might convict the Star of monopolizing the dissemination of news and advertising on the basis of the unit subscription rate alone. (R. 2456) This charge was sustained practically

without discussion by the Court of Appeals. (Appendix A, p. 22a).

Extended discussion is unnecessary here since the vice of the charge as to the unit subscription rate is the same as that as to the unit advertising rate:

—it permitted the jury to find that, given dominance, the use of the unit subscription rate, alone, could furnish sufficient evidence of both a monopolistic act and a monopolistic intent and thus, without more, could suffice for conviction;

—it permitted a finding, unsupported by evidence, that the issues of the Star were "two newspapers".

What the unit subscription rate is.

Individual copies of the Star were freely on sale at any news stand.

In addition, the Star offered a weekly subscription rate, covering the morning, evening and Sunday issues—13 issues for one week for 40¢. It would not accept subscriptions for home delivery for one issue only (R. 1225-26).

Not a monopolistic action nor evidence of monopolistic intent

The same considerations which justify the use of the unit advertising rate as reasonably in furtherance of the self-interest of a newspaper also justify the use of the unit subscription rate.

The Star publishes two issues, each covering a 12-hour period, instead of publishing, as do many newspapers, only one issue covering the previous 24 hours. The two issues are two halves of the same thing, and are sold as such (R. 1887-89, 2393-95).

It is undisputed that use of the unit subscription rate enabled the Star to operate much more economically and

efficiently. It made it unnecessary to reprint in the evening issue a substantial part of the news that had already appeared in the morning issue. This resulted in savings to the Star and its subscribers of millions of dollars a year (R. 1617-24, 1631-36, 1767-70, 1888-89, 2394-97, 2411; DX 47, 48, R. 2928-31).

Clearly, it was within the reasonable discretion of the Star—as a sole trader—to offer its paper upon a basis which enabled it to operate with maximum efficiency and at the lowest cost.

There was no evidence whatever that this subscription policy was intended to injure competing media or that it did so. Not a single competitor—not a single subscriber—appeared to testify against it. The Court of Appeals ignored this lack of evidence and ruled that the effect was "self evident". But in a criminal case, injury must be factually proven. It cannot rest on speculation or conjecture. *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 622 (1953); *Maryland & Virginia Milk Producers Ass'n* v. *United States*, 193 F. 2d 907, 917 (D. C. Cir. 1951); *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 207 (D. Del. 1953), *aff'd*, 351 U. S. 377 (1956).

In the absence of any evidence whatever that the purpose of the unit subscription rate was anything other than to promote efficiency in operation or that it had the effect of monopolizing, it was reversible error to charge the jury that it could find the Star guilty because of the use of the unit subscription rate alone.

IV

The definitions of monopoly established by the lower courts are directly contradictory to the criteria established by this Court.

No conspiracy was charged in this case. But both the Trial Court in its charge and the Court of Appeals in its opinion explicitly ruled that the existence of monopoly power, when coupled with the intent to use that power, constituted a violation of the Sherman Act in a non-conspiracy case *even though that power was not actually exercised.*

Thus, the Trial Court charged the jury:

> "Monopolization means the possession of monopoly power by a party or parties through which power it is possible to exclude actual or potential competitors from any part of the trade or commerce among the several states, provided that he or they have the intent or purpose to exercise that power. *However, the power need not actually be exercised.* I think I should read that to you again." (R. 2444) (Emphasis supplied.)

Similarly, the Court of Appeals, relying on *United States* v. *Griffith*, 334 U. S. 100 (1948), held:

> "Where the charge is that of monopolization, it is necessary only to establish the existence of an intent to monopolize coupled with monopoly power" (Appendix A, p. 32a).

Rejecting petitioner's contention that *Griffith* was not controlling where a sole trader was concerned, the Court quoted, italicized and followed the following language from *Griffith:*

> "... *monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under §2 even though it remains unexercised.* * * *" (*Id.*, p. 33a).

The *Griffith* case involved a combination of four companies which used their combined purchasing power to secure exclusive contracts for the exhibition of motion pictures—not a single-firm monopoly.

So far as petitioner can determine, the case at bar is the first case which has flatly ruled that the conspiracy doctrine which condemns even unexerted power is equally applicable to sole traders.*

As such, it seems irreconcilable with pronouncements of this Court and of other circuits. Thus, this Court in its discussion in the *Cellophane* case under the heading "The Sherman Act, §2—Monopolization", 351 U. S. at 390-91, stated:

> "Senator Hoar, in discussing §2, pointed out that monopoly involved something more than extraordinary commercial success, 'that it involved something like *the use of means which made it impossible for other persons to engage in fair competition.*' This exception to the Sherman Act prohibitions of monopoly power is perhaps the monopoly 'thrust upon' one of *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429, left as an undecided possibility by *American Tobacco Co.* v. *United States*, 328 U. S. 781. Compare *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 342." (Emphasis supplied.)

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* This Court has repeatedly held that the rules applicable to conspiracies are not applicable to a single firm acting as a sole trader. See, *e.g.*, *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565 (1924); *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919).

The ruling in the instant case seems equally antithetical to Mr. Justice Frankfurter's concurring opinion in *Cellophane*, 351 U. S. at 413.

In addition to directing conviction for the possession of unexerted power,* the Trial Court's charge watered down the definition of monopoly beyond recognition by equating monopoly with "dominance" and "dominance" with being "the biggest"; by instructing the jury that monopoly power consists of the power to secure a "competitive advantage" or to impose a "handicap" (R. 2444-45, 2446, 2447, 2453-57).

Dominance, however great, does not equal monopolization.

As Judge Knox expressly held in the *Aluminum* case, a company can occupy a "dominant" position without possessing an illegal monopoly:

> "The conclusion is inescapable, from the Columbia Steel decision [334 U. S. 495], that the possession of monopoly power is something other than the status in a market of a dominant firm. *The dominant firm may have neither the power to exclude competitors, nor the power to fix prices.*" *United States* v. *Aluminum Co. of America*, 91 F. Supp. 333, 346 (S. D. N. Y. 1950). (Emphasis supplied)

Judge Knox relied, among other things, upon *United States* v. *International Harvester Co.*, 274 U. S. 693 (1927), in which case, as Judge Knox said:

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* This fatal error in the charge of the Trial Court was not cured —as the Court of Appeals apparently believed—by the general language in the charge that defendant should be convicted if the jury found that it had committed the acts charged, nor by the statement that, absent both intent and commission of acts, defendant should be acquitted. Neither statement modified the Trial Court's explicit instruction, twice repeated, that the existence of power was enough and that such power "need not actually be exercised." (R. 2444)

> "... the Court found the existence of 'effective competition' notwithstanding that defendant enjoyed 64 per cent of the trade in harvesting machines, and had capital and resources in excess of the aggregate of its competitors." (91 F. Supp. at 342)

Nothing less than the power to control prices and exclude competition will do. Yet, under the diluted definition prescribed in this action, any newspaper which was the sole newspaper in its town would, inescapably, be guilty of monopolization.

Reasons for Granting the Writ

Petitioner's prayer for a writ of certiorari should be granted for the following reasons:

1. If permitted to stand unreversed, the decision below will have an immediate and direct *in terrorem* effect on the press of this nation. By branding 92% of the newspapers of this country possessors of "monopoly power" the decision places the press in constant jeopardy of prosecution at the whim of the Attorney General.

2. The refusal of the Trial Court even to permit the jury to consider petitioner's evidence as to the appropriate market is irreconcilable with this Court's decision in the *Cellophane* case.

3. The market defined by the Trial Court as a matter of law is in conflict with the principles of the *Cellophane* case and the market recognized as appropriate in *Times-Picayune*.

4. In permitting the conviction of petitioner on the basis of the unit advertising rate alone, the decision

below conflicts with *Times-Picayune*, which sustained the use of such rate, and with a decision of the Court of Appeals for the Second Circuit. The similar charge with respect to the unit subscription rate is equally repugnant to *Times-Picayune*.

5. The criteria of monopolization laid down by the lower courts are inconsistent with the law as enunciated by this Court and by the Courts of Appeals of other circuits.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 10, 1957.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 15,456

THE KANSAS CITY STAR COMPANY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

No. 15,457

EMIL A. SEES,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[January 23, 1957.]

ELTON L. MARSHALL (HENRY N. ESS, CARL E. ENGGAS, COLVIN A. PETERSON, JR., and WATSON, ESS, MARSHALL and ENGGAS were with him on the brief), for Appellant The Kansas City Star Company.

CARL E. ENGGAS (HENRY N. ESS, ELTON L. MARSHALL, MELVIN J. SPENCER, and WATSON, ESS, MARSHALL and ENGGAS were with him on the brief), for Appellant Emil A. Sees.

EARL A. JINKINSON, Attorney, Department of Justice, and JOSEPH E. McDOWELL, Attorney, Department of Justice (EDWARD L. SCHEUFLER, United States Attorney, VICTOR H. KRAMER and DANIEL M. FRIEDMAN, Attorneys, Department of Justice, VICTOR R. HANSEN, Assistant Attorney General, and RAYMOND P. HERNACKI and WILLIS L. HOTCHKISS, Attorneys, Department of Justice, were with them on the brief), for Appellee.

Before GARDNER, Chief Judge, and WOODROUGH and VOGEL, Circuit Judges.

VOGEL, Circuit Judge.

The Kansas City Star Company, Roy A. Roberts, its president and chairman of the Board of Directors, and Emil A. Sees, its director of advertising, treasurer and a member of the Board of Directors, were all charged in an indictment with a violation of Section 2 of the Sherman Anti-Trust Act, 15 U. S. C. A. §2. The indictment was in two counts. The first count charged that the appellants had been and were up to the time of the return of the indictment engaged in an attempt to monopolize interstate trade and commerce in the dissemination of news and advertising. In Count No. 2 the appellants were charged with a monopolization of interstate trade and commerce in the dissemination of news and advertising. Prior to trial, and on motion of the government, the indictment was dismissed as to Roy A. Roberts. After a trial, lasting from January 17, 1955 to February 22, 1955, the jury returned a verdict of guilty as to The Kansas City Star Company on both counts of the indictment and a verdict of guilty as to Emil A. Sees on Count 1 and not guilty on Count 2. The court, concluding that the offense of

attempting to monopolize as charged in Count 1 of the indictment merged into the greater offense of monopolization as charged in Count 2, imposed a single penalty of a $5,000.00 fine as to the appellant The Kansas City Star Company, hereinafter referred to as The Star. Appellant Sees, having been convicted on Count 1 only, was punished by a fine of $2500.00. Both parties separately prosecuted an appeal to this court. They were, however, indicted together, tried and convicted together, and will be considered together in this opinion, separate reference being made to each where that becomes necessary or expedient.

That portion of the statute under which the indictment was found, 15 U.S.C.A. §2, is as follows:

> "*Every person who shall monopolize, or attempt to monopolize,* or combine or conspire with any other person or persons, to monopolize *any part of the trade or commerce among the several States,* or with foreign nations, *shall be deemed guilty of a misdemeanor,* and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (Emphasis supplied.)

The Sherman Act aims at the evils of monopoly and monopolistic practices in interstate trade and commerce. That it can apply to the dissemination of news and advertising there can be no doubt. In a case quite similar to this one, the Supreme Court commented, *Lorain Journal* v. *United States,* 1951, 342 U.S. 143, 152:

> "The distribution within Lorain of the news and advertisements transmitted to Lorain in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public is an inseparable part of the flow of the interstate commerce involved. See *Binderup* v. *Pathe Exchange,* 263 U.S. 291, 309; *Stafford* v. *Wallace,* 258 U.S. 495, 516; *Illinois Central R. Co.* v. *Louisiana R.*

Comm'n, 236 U.S. 157, 163; *Swift & Co.* v. *United States,* 196 U.S. 375, 398. Unless protected by law, the consuming public is at the mercy of restraints and monopolizations of interstate commerce at whatever points they occur. Without the protection of competition at the outlets of the flow of interstate commerce, the protection of its earlier stages is of little worth."

See also *Associated Press* v. *United States,* 1945, 326 U.S. 1, 14, holding trade in news among the several states to be interstate commerce.

In this appeal, both appellants allege many errors in rulings on various motions, the receipt of certain evidence, the exclusion of other evidence, and the court's charge to the jury.

Pre-Trial Orders

At the outset, appellants moved to dismiss the indictment and each count thereof on the grounds that each count failed to state the particular act or acts charged to constitute the offense with reasonable definiteness and that each count was so vague and indefinite that it did not inform the appellants of the nature and cause of the accusation against them, thereby denying rights guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States and Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

The indictment identifies and describes The Kansas City Star Company as being a corporation and the publisher of a morning daily newspaper known as The Kansas City Times, an evening daily newspaper known as The Kansas City Star and a Sunday newspaper known as The Sunday Star. It alleges that The Star also owns and operates radio station WDAF and television station WDAF-TV at Kansas City, Missouri. Sees is described as the director of advertising, treasurer and a director of The Kansas City Star Company. The indictment makes it clear that the geographical area in which the appellants are charged with

monopolization and attempt to monopolize news and advertising in metropolitan Kansas City, Missouri, covered the Counties of Jackson and Clay in the State of Missouri and the Counties of Wyandotte and Johnson in the State of Kansas. In addition, it sets forth its definitions of the terms "classified advertising", "display advertising", "local display advertising" and "general advertising". It describes the nature of the trade and commerce of an interstate nature to which the indictment was applicable; that The Times and Star are delivered to 96% of all the homes in metropolitan Kansas City each day; that The Times' total net paid circulation exceeds 353,000 copies daily, The Star's total net paid circulation exceeds 361,000 copies daily; that The Sunday Star exceeds 378,000 copies each Sunday. It sets forth the formation and growth of The Kansas City Star, and the acts and practices upon which it is charged that there was an attempt to monopolize, as well as the acts and practices on the part of the appellants which it is charged resulted in monopolization.

From an examination of the indictment and the particularizations set forth therein, we are convinced that Rule 7(c) of the Federal Rules of Criminal Procedure was satisfied in that the indictment does contain "* * * a plain, concise and definite written statement of the essential facts constituting the offense charged". We are of the opinion that it charges offenses with sufficient clarity to enable the appellants to properly prepare their defense and with sufficient certainty and definiteness that trial thereon would be an effective bar to future prosecution for the same acts. *United States* v. *Cruikshank*, 1875, 92 U.S. 542, 566, 568; *Bennett* v. *United States*, 1913, 227 U.S. 333, 338; *Berger* v. *United States*, 1935, 295 U.S. 78, 82; *Hewitt* v. *United States*, 8 Cir., 1940, 110 F.2d 1, 6, cert. den. 310 U.S. 641; *Claiborne* v. *United States*, 8 Cir., 1935, 77 F.2d 682, 689. In prosecutions under the Sherman Act, it would seem particularly true that there has been no marked reliance upon rigorous common law standards. E.g., *Nash* v. *United States*, 1913, 229 U.S. 373; *Knauer* v. *United States*, 8 Cir., 1916, 237 F. 8; *United States* v. *American Medical Association*, C.A.D.C.,

1940, 110 F.2d 703, 715, 716, aff'd. 317 U.S. 519; *United States* v. *Armour & Co.*, 10 Cir., 1943, 137 F.2d 269, 270.

We are satisfied that the indictment complies with the provisions of Rule 7(c) and does not violate or deny the rights guaranteed by the Fifth and Sixth Amendments to the Constitution. There was no error in overruling appellants' motion.

All of the pre-trial motions hereafter discussed are addressed to the discretion of the trial judge. It is a fundamental rule of our appellate procedure that the trial judge will not be reversed after using his considered judgment on discretionary orders provided there has been no abuse of such discretion. With this rule in mind, we proceed to examine separately the pre-trial motions and the alleged erroneous orders issued as a result of those motions.

Subsequent to the court's denial of the motion to dismiss the indictment, appellants made a motion for a bill of particulars, the denial of which is cited as error. An examination of the motion for a bill of particulars convinces us that it was aimed at obtaining in particular the details of the government's evidence. It is not the function of a bill of particulars to set forth evidentiary detail. Furthermore, the granting or denial of a motion for a bill of particulars is generally addressed to the sound discretion of the trial court. The rulings of the trial court thereon will not be disturbed excepting for clear abuse of that discretion. *American Tobacco Co., et al.* v. *United States,* 6 Cir., 1944, 147 F.2d 93, 117, aff'd. 328 U.S. 781 (an anti-trust case):

> "The granting or denying of demands for particulars is a matter within the discretion of the trial court and, unless there is an abuse thereof, its actions will not be disturbed."

In *Sawyer* v. *United States,* 8 Cir., 1937, 89 F.2d 139, 141, this court said:

> "If the language of the indictment is so far definite and certain as to safeguard all of the rights of a defendant and to enable him properly to prepare his

defense, a bill of particulars will not be required. *Bedell* v. *United States* (C.C.A.) 78 F.(2d) 358. The granting or the refusal of a motion for a bill of particulars is a matter that is governed by the sound judicial discretion of the trial court, and unless it shall be shown affirmatively that such discretion has been abused by the trial court a refusal to require a bill of particulars will not be disturbed by an appellate court."

There is no showing here that appellants were prejudiced by the court's denial of their demand. This is particularly true in light of the fact that appellants subsequently on August 13, 1954, filed a motion for discovery and inspection which the court granted by order on September 2, 1954, making available to the appellants all documents covered by previous orders impounding such documents at the request of the grand jury. The case did not go to trial until January 17, 1955—apparently a sufficient length of time for the appellants to examine and become familiar with the documentary evidence relied upon by the government.

The appellants moved the court for an order fixing the time within which evidence would be admitted to a period of three years[1] prior to the return of the indictment and requested that evidence of events occurring prior thereto be excluded. In denying that motion, the trial court fixed January 1, 1936, as the cut-off date. Evidence of events occurring prior thereto was not to be admitted.

Intent was a vital element of the charges against the appellants. *Times-Picayune* v. *United States,* 1953, 345 U.S. 594, 626. Where that is true, "* * * it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment". *Wood* v. *United States,* 16 Peters

[1] 18 U.S.C.A. §3282 provides for a three-year limitation to prosecutions such as here involved.

341, 358. In *United States* v. *Pullman Co., et al.*, 50 F.Supp. 123 (E.D. Pa., 1943) aff'd. 330 U. S. 806, an anti-trust case, the court, in commenting on evidence prior to the indictment period, stated at page 126:

> "We think they are competent evidence to show defendants' state of mind at the time. The time, of course, was a good while ago, long before the Sherman Act. But if such declarations point in the direction of a path which has been followed continuously since their adoption, it is not unfair to take them as the initiation of a consistent Pullman policy. *Standard Oil Company of New Jersey* v. *United States,* 1911, 221 U.S. 1, 46, 47, 75, 76, 31 S.Ct. 502, 55 L.Ed. 619, 34 L.R.A., N.S., 834, Ann. Cas. 1912D, 734; *United States* v. *Reading Company,* 1920, 253 U.S. 26, 43-45, 40 S.Ct. 425, 64 L.Ed. 760."

In order to show intent, it was entirely proper to receive evidence of a course of conduct engaged in by the appellants over a period of years leading up to the indictment period which might assist the jury in attempting to determine whether or not the appellants possessed that necessary intent during the time covered by the indictment. It would be illogical not to admit evidence as to a course of conduct over many years which manifested an intent to monopolize. But we need not use a rationale to explain this state of the law. The federal courts in anti-trust cases have long admitted evidence of conduct prior to the statutory period. *Standard Oil Co.* v. *United States,* 1911, 221 U.S. 1, 75-76; *United States* v. *Pullman Co.,* supra; *American Tobacco Co.* v. *United States,* 1944, 6 Cir., 147 F.2d 93, aff'd. 328 U.S. 781. The evidence here of prior conduct was admitted by the trial court and the jury instructed that:

> "* * * you may consider all evidence of acts which occurred prior to January 6, 1950, insofar as it may show a design or intent or pattern of conduct of the defendants with respect to their actions after January 7, 1950."

They were specifically told:

> "Under the law the defendants cannot be convicted for acts which occurred prior to the three years immediately preceding the date of indictment."

After the court's denial of appellants' motion to confine the evidence to the three-year period, the appellants objected to the 1936 cut-off date for evidence as being arbitrary and without regard to their own relevant evidence. In fixing a cut-off date, the trial court's purpose was to eliminate remote evidence and keep the trial within reasonable bounds. Apparently the trial court felt that 1936 was the most practical date for such a cut-off. The trial court is given a wide range of discretion in exercising its right and duty to control the trial and keep it within reasonable time limits. *United States* v. *Socony-Vacuum Oil Co.*, 1940, 310 U.S. 150, 229-231. In considering the numerous witnesses and the mass of evidence, some conceivably going back as far as 1880, the founding date of The Star, the trial court was exercising its considered judgment in fixing the cut-off date. We see no justification in the record for disturbing the court's determination.

Complaint is made of the trial court's overruling of appellants' motion for a continuance filed on January 10, 1955. Such a motion is addressed to the sound discretion of the trial court. In the absence of a pure abuse of such discretion, the action of the trial court will be sustained. We find no such abuse here. We come to the same conclusion with reference to several motions for adjournment made during the trial.

Prior to trial, Sees filed a motion for severance which he claimed was improperly and erroneously denied. Separate trials are not necessarily a matter of right. See Rule 8(b) Federal Rules of Criminal Procedure, 18 U.S.C.A. In *Mellor* v. *United States*, 8 Cir., 1947, 160 F.2d 757, cert. den. 331 U.S. 848, this court, speaking through Judge Woodrough, stated at page 761:

> "It is contended that it was improper to join two defendants in this single count indictment charging a

substantive offense and not a conspiracy. However, the right to charge two defendants jointly in a single indictment is recognized in a number of well reasoned cases, which hold that such procedure does not result in misjoinder of defendants, nor render the indictment subject to attack for duplicity."

In dealing with a similar contention, the Court of Appeals for the District of Columbia, in *Hall* v. *United States,* C.A.D.C., 1948, 168 F.2d 161, 163, cert. den. 334 U.S. 853, stated:

"Hall and Gray assert that their motions for severance were improperly denied. It is the general rule that persons jointly indicted should be tried together, and granting separate trials is a matter of discretion. The mere fact that admissions have been made by one which are not evidence as against the others is not a conclusive ground for ordering the parties to be tried separately. *Lucas* v. *United States,* 70 App. D.C. 92, 104 F.2d 225."

Even where defendants have been separately indicted the ordering of a joint trial by the District Court may be sustained under the provisions of Rule 13 of the Federal Rules of Criminal Procedure, 18 U.S.C.A. In the case of *Malatkofski* v. *United States,* 1 Cir., 1950, 179 F.2d 905, the Court of Appeals stated, at page 909:

"Since the defendants were alleged 'to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses', they might, under Rule 8(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. have been joined as defendants in a single indictment. Under these circumstances the District Court was authorized by Rule 13 to order the indictments to be tried together. Each defendant moved for a separate trial on the general ground (no details being specified) that standing trial with the other defendant would be prejudicial. These motions for severance

were denied. In this there was no error. The matter lay in the discretion of the trial judge, and no extraordinary facts appear from which it could be said that denial of the motions was an abuse of discretion. See *Stilson* v. *United States*, 1919, 250 U.S. 583, 40 S.Ct. 28, 63 L.Ed. 1154. Throughout the trial, whenever evidence was introduced which was competent against one defendant and incompetent against the other, the judge duly admonished the jury that the evidence was received only as against the one defendant and must be disregarded by them in their consideration of the case of the other defendant. See *United States* v. *Ball*, 1896, 163 U.S. 662, 672, 16 S.Ct. 1192, 41 L.Ed. 300."

The Supreme Court has lent finality to the rule of discretion on the part of the trial court in determining a motion for severance in the recent case of *Opper* v. *United States*, 1954, 348 U.S. 84, 95:

"It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled. The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial."

See also Note and cases cited in 70 A.L.R. 1172.

In this case, the court repeatedly throughout the trial admonished the jury that certain evidence received was

not applicable to Sees and carefully charged the jury that Sees could be held responsible only for acts performed by him or under his direction. The fact that the jury returned a verdict of not guilty on the second count as to Sees but nevertheless found The Star guilty shows they gave individual treatment to each and lends impetus to the statement that "our theory of trial relies upon the ability of a jury to follow instructions". The refusal of the trial court to grant Sees' motion for severance was a valid exercise of discretion and in the absence of a showing that such discretion was abused is not reversible here. No error was committed in denying Sees' motion for severance.

EVIDENCE, TRIAL RULINGS AND INSTRUCTIONS.

The Kansas City Star was founded in 1880. Among its competitors at that time were the Kansas City Journal, founded in 1854, and the Kansas City Times, founded in 1867. In 1894 The Sunday Star was established. In 1901 the owner of The Kansas City Star acquired The Times and thereafter published The Kansas City Times (morning), The Kansas City Star (evening) and The Sunday Star. In 1905 the Kansas City Post was established. The Journal and the Post were merged in 1922. The Kansas City Star Company (the present appellant) was incorporated in 1926, at which time it commenced operation of radio station WDAF, later owning and operating television station WDAF-TV. In 1928 the morning Journal discontinued publication. The Sunday Journal discontinued in 1941 and the evening Journal discontinued in March, 1942.

The metropolitan Kansas City area in which the appellants were charged with attempting to monopolize and monopolization of interstate trade and commerce in the dissemination of news and advertising is made up of four counties: Jackson and Clay in the State of Missouri and Wyandotte and Johnson in the State of Kansas. Within this area there are located four major urban communities:

Kansas City, Missouri; Kansas City, Kansas; North Kansas City, Missouri; and Independence, Missouri. This metropolitan area contains a population of approximately 854,000 persons. During the indictment years The Star advertised and the evidence justified the conclusion that it possessed 95% coverage of all households in the four counties referred to. In 1952, one of the indictment years, there were seven daily newspapers published in the four-county area in addition to those published by The Star. These daily newspapers were The Kansas City Kansan, The Independence Examiner, The Excelsior Springs Standard, The Independence Daily News, The Daily Record, The Kansas City News-Press, and The Daily Drovers Telegram.* The Star's dominance in the area is evidenced by circulation figures.

	"1951 [1]		1952 [1]	
	Average Daily Circulation	Per Cent of Total	Average Daily Circulation	Per Cent of Total
1. Kansas City Star Company				
Kansas City Times (M)	351,126 [2]	46.58	350,206 [2]	46.74
Kansas City Star (E)	360,143 [2]	47.78	358,231 [2]	47.81
Total Times and Star	711,269 [2]	94.36	708,437 [2]	94.56
2. Kansas City Kansan (E)	29,084 [2]	3.86	27,873 [2]	3.69
3. Independence Examiner (E)	7,754 [3]	1.03	7,862 [3]	1.05
4. Excelsior Springs Standard (E*)	3,189 [3]	.42	3,283 [3]	.44
5. Independence Daily News (E ex. Sat.)	1,448 [3]	.19	550 [3]	.07
6. Daily Record (D)	1,015 [3]	.14	1,004 [3]	.13
7. Daily News Press (D)	Not published		445** [3]	.06
Total Kansas City	753,759	100.00	749,454	100.00

[1] Figures refer to twelve-month period ended September 30 of each year.

[2] Source: Audit Bureau of Circulations, Audit Reports.

[3] Source: Statement of ownership, management and circulation required by Act of Congress of August 24, 1912 (Title 39, U. S. Code, Sec. 233).

* Tuesday, Wednesday, Thursday and Friday.

** Three months preceding October 1, 1952.

M—Morning.

E—Evening.

D—Daily".

* A trade journal limited to livestock reports.

Evidence reflecting the advertising revenue of daily newspapers in the Kansas City area for 1951 and 1952 discloses that in 1951 the appellant Star received a net advertising revenue of $17,774,581.17 or 94.11% of the total. The Kansas City Kansan received $716,556.79 or 3.79% of the total. The other newspapers received lesser percentages. In 1952, the appellant Star received a net advertising revenue of $18,655,629.64 or 94.08% of the total. The Kansas City Kansan received $739,509.36 or 3.73% of the total. Other daily newspapers received smaller percentages. A tabulation of advertising revenue from daily newspapers, radio and television stations located in the area for the years 1951 and 1952 indicates that the appellant Star in 1951 received $19,938,484.68, or 84.24% of the total. Its nearest competitor, The Kansas City Kansan, received in 1951 a total of $1,022,003.71, or 4.32% of the total, with other competitors having smaller percentages. In 1952, The Star received of such advertising revenue $21,350,721.97, or 85.40% of the total. Its nearest competitor, The Kansas City Kansan, received $1,044,302.75, or 4.18% of the total, with other competitors having lesser percentages.

The Star's "dominant" position as to both circulation and advertising in the daily newspaper field in metropolitan Kansas City becomes apparent.

The government sought to show that The Star's dominant position gave it the power to exclude competition and that it, through appellant Sees and others, exercised such power for the purpose and with the intent of excluding competition. Evidence tended to show and the jury was justified in concluding that The Star was an indispensable advertising medium for many advertisers and that it threatened advertisers with refusal to take their ads if they advertised in competitive publications. As an example, the manager of three theaters in Kansas City, Missouri, was told that his ad should be taken out of the Journal-Post and that if he didn't do so, his advertising would be left out of The Kansas City Star and Times. The manager of a store in Kansas City who had been advertising in the Journal-Post and who wanted to get his ads

back into The Star was given to understand that it would be on an exclusive basis only. The then advertising manager of The Star instructed a Star solicitor to see one of The Star's regular advertisers who was also using the Journal-Post, "* * * to go over there and either get him out of the Journal or get him out of The Star". Appellant Sees instructed solicitors to get advertisers out of the Journal-Post. The local advertising manager for Sears, Roebuck was told by a Star solicitor that The Star did not like to see ads running in the News Press and stated, "If you don't desist, you will either injure your position in the Kansas City Star or if we have additional newsprint to allocate you may not get your share." Appellant Sees, speaking in behalf of the appellant Star, told an advertiser, "That is all right, you can go ahead and advertise in that medium if you want to, but if you have other mediums to advertise in, then you don't need the Kansas City Star." During the newsprint shortage of 1946-1947 an advertiser who planned on using other advertising publications was told by a Star solicitor that if he continued to use other media "the chances were that the space in The Star would no longer be available * * *." These are but some of the instances shown in the record of the use of threats and coercion on the part of The Star and Sees to destroy competition.

Other evidence is disclosed in the record whereby the jury could have concluded that advertisers were threatened with loss of desirable position in The Star papers if they placed ads in competitive publications. The evidence indicated The Star extended its discipline to potential competitors. When several Kansas City merchants had made short term contracts with Prom, a new monthly magazine for children of school age, Star solicitors informed them as to the merits of terminating their use of Prom. As the merchants began to receive poor positions in The Star, they got the hint and at least two withdrew the Prom advertisements.

The course of conduct of The Star and Sees continued on through the preliminary period subsequent to 1936

into the indictment years extending from January 7, 1950, through January 6, 1953. A store manager testified that in 1952 and prior years he would receive from The Star clippings of ads he had placed in other media. A solicitor told him that his other ads were looked upon unfavorably and that if he wished a more favorable position in The Star it would be better if he confined his advertising only to The Star. As a result, the manager discontinued his use of a rival paper, the News Press. A dance studio manager testified that in 1952 he found the studio's ad missing from the usual position in The Sunday Star. One of the studio owners said that she had spent considerable time in search for it and then complained to The Star. In explanation of the change of position, a solicitor told her, "Well, I assumed that you didn't appreciate the place which you have been getting because I notice you have an ad in the News Press." The ad was withdrawn from the News Press and the following week the studio ad reappeared in the customary position in The Sunday Star. A patron of 18 years discovered in July of 1952 that his ad was much further back than usual. The reason, as Sees explained while pointing to a rival paper was, "Do you have to advertise, do you have to run such a large size ad in that particular paper?"

It may well have been, as The Star suggests, that innocent motives dictated the placing of ads in one position or another but the jury decided, as was their prerogative, that the motive was otherwise.

Evidence in the record would have justified the jury in finding that with some advertisers The Star threatened to discontinue their ads unless The Star was given "equal space" with competitive publications, regardless of how limited their circulation and the fact that "equal space" in a large publication such as The Star would cost a great deal more than the same space in one of its small competitors. The record further justifies the conclusion that some advertisers were threatened with having their credit cut off where they also used competitive publications for advertising.

An example of the use of the dissemination of news to control advertising is illustrated in the instance of a big league baseball player who was a partner in a florist's shop in Kansas City. The florist shop also advertised in the Journal-Post. A Star solicitor informed one of the partners that The Star would discontinue publicizing the baseball player if the florist shop continued using the Journal-Post for advertising, Sees instructing a Star solicitor to tell them, "• • • to get out of the Journal-Post or he wouldn't get any sports, that he wouldn't get any cooperation from the sports desk on anything that he did in organized baseball." Sees instructed the solicitor, "• • • Sees told me that if, that if I didn't get the ad in the Post to go out and tell Gleeson that if he knocked 100 home runs in the year his name would never appear in the paper outside of the box score and it got so hot to me that I told Gleeson to come down to The Star to get me off the hook with Mr. Sees," and the solicitor for The Star then told the advertiser, "I told him that they wanted him out of the Post and that if he didn't get out of the Post that he wouldn't get much sport write-up from the sport desks."

The record discloses instances of the appellants using the dominant position of The Star to dictate to advertisers how much of their advertising quota would have to be spent with The Star. An instance in 1950 is illustrative: The representative of an advertising agency which had charge of advertising a forthcoming auto show talked with appellant Sees and was told, "Well, we can make or break your show," and was told what portion of their budget was to be spent in The Star papers. Sometimes the threat to close an account was enough to curtail use of other media. In 1951, a cloth supplier to The Star who placed ads in The Star also placed another ad in the News Press. A Star solicitor subtly suggested that it was not "right" to run an ad elsewhere than in The Star. To this the firm agreed. The ad in the News Press was promptly and permanently withdrawn because they "appreciated the business • • • from The Star."

From 1949 to the date of the return of the indictment The Star owned WDAF-TV, the only television station in the metropolitan Kansas City area. In addition, it owned radio station WDAF. The evidence in the record would justify the jury in concluding that The Star used its dominant position to aid in its newspaper advertising, making it clear in some instances that advertisers could not buy time on WDAF-TV unless they also advertised in The Star papers. For example, in 1952 The Star refused time on WDAF-TV to a furniture company. A Star solicitor called attention to the fact that the company did not use The Star columns. When the solicitor was told that they had no need for newspaper advertising, he then in effect told them that if that were the case the company had no need for television and refused the request for time.

Another instance of using television as a weapon to exclude competition was related by a part owner of Television Preview magazine. In 1952, one Dean Fitzer, general manager of WDAF-TV and a director of The Star, told the part owner, in response to a request for television time, "We won't tell you that we can't sell you time, but just don't ask me for it, because I won't have any." And if this was not quite clear enough, he added, "I don't want to see this magazine on television." The Star having the only television outlet available in the area, Television Preview was unable to advertise in the most logical medium—television.

These and other instances indicate that the television and radio facilities of The Star were being used more as appendages to the successful operation of The Star than they were being used as independent entities.

It was The Star's practice to sell its daily newspapers to its subscribers in combination only. Subscribers were required to subscribe to the morning Times and the evening Star in combination with The Sunday Star for a total of thirteen papers per week for a single price (all papers could be individually purchased at newsstands). This joint subscription was an invariable policy and insisted upon under any circumstances.

With reference to classified advertisers and general advertisers, The Star required that they run their advertisements in both the morning Times and the evening Star, regardless of the desire of the advertisers to use only one of the papers. The evidence indicated that The Star used its dominant position to force advertisers to advertise in both the morning Times and the evening Star regardless of their wishes and regardless of the fact that some of them felt that because of their particular type of business either the morning issue of The Times or the evening issue of The Star was the only advertising vehicle from which they derived benefit. It was the government's claim that such forced combination of The Times and Star advertising had the effect of foreclosing competition in that advertisers who had of necessity to depend upon either The Times or The Star and were forced to use both could not advertise in competing publications because of their unnecessary expenditures in the forced combination.

The Star contends that it publishes but one newspaper of thirteen issues per week; that these issues are sold in combination in order that the reader may obtain a complete round-the-clock news report, thus enabling The Star's readers to get news more frequently than is possible in a 24-hour newspaper. The morning paper is designated "The Kansas City Times" but nevertheless carries in parentheses over its name "The Morning Kansas City Star".

It was the position of the government that the morning Times and the evening Star constituted two separate and distinct newspapers owned by The Star and that it was the intention of The Star to exclude competition by means of a forced combination subscription policy and unit advertising rate; that it maintained the subscription rate at an arbitrarily and unreasonably low level during the period when the most serious competition existed, that is, while the Journal-Post was still being published, and that in April, 1942, a month after the Journal-Post ceased pub-

lication The Star raised its subscription rates. The government points out that from 1938 to 1941 The Star's total revenue remained relatively constant, whereas starting with the demise of the Journal-Post and the increase in subscription rates immediately thereafter The Star's revenue went from $7,924,516.66 in 1941 to $10,231,883.47 in 1943, while its operation expenses declined from $6,530,757.24 to $6,497,837.31 during the same period.

It is The Star's claim that its survival and present position of dominance were entirely the result of superior skill, foresight and industry; that its continuous growth and expansion were the result of efficient management and public acceptance; that its thirteen issues per week were published in such a manner as to fully and efficiently utilize its plant equipment and personnel; that its advertising and subscription rate structures were to enable it to increase its efficiency and to better serve its customers, both advertisers and subscribers. It asserts that its unit advertising rates are legal and that the court erred in charging that the use thereof could constitute a monopolization.

In the first place, appellants' contention is prefaced with the assumption that The Star published but one newspaper of thirteen issues per week and not two newspapers, the morning Times and the evening Star, as contended by the government. On this point, the trial court commented to the jury:

> "The papers apparently are distinct in appearance, except that the morning paper carries the parenthetical heading stated aforesaid, that it is the morning edition of the Kansas City Star and it carried entirely different news, different syndicated columns, different comics,"

but stated:

> "• • • you must consider whether The Kansas City Times and The Kansas City Star are separate and distinct newspapers, for obviously the forced

combination could operate only between two newspapers and not between editions of the same paper."

We think a question of fact was raised and that it was properly left for the determination of the jury. In contending that the unit advertising plan was legal, appellants place substantial reliance upon *Times-Picayune Publishing Co., et al.* v. *United States,* supra, 1953, 345 U.S. 594, wherein the United States Supreme Court reversed the trial court and held that the unit advertising rate therein involved was not a violation of the Sherman Anti-Trust Act. The *Times-Picayune* case was, in the last analysis, determined on the basis of a failure of proof. Tying arrangements in advertising may be in violation of the Sherman Act, but the Supreme Court found in the *Times-Picayune* case that the record there did not justify that conclusion. The Supreme Court has said that tying or unit arrangements are not of themselves unlawful, but also makes it manifest that neither are they of themselves lawful. As with most cases, tying arrangements must be judged amidst the circumstances and surroundings in which they operate. The Supreme Court thus concludes, 345 U. S. 594, 627:

"• • • this record does not establish the charged violations of § 1 and § 2 of the Sherman Act. We do not determine that unit advertising arrangements are lawful in other circumstances or in other proceedings. *Our decision adjudicates solely that this record cannot substantiate the Government's view of this case.*" (Emphasis supplied.)

Unlike *Times-Picayune,* but comparable to the situation presented in the *Lorain Journal Co., et al.* v. *United States,* supra, 1951, 342 U.S. 143, we think the record here could justify the jurors' conclusion that the morning Times and evening Star were two separate newspapers with distinct and separate uses for advertisers; that each was dominant in its own field; that together they dominated

the market both morning and evening; and that the unit advertising method was used, notwithstanding the protests of advertisers, with the intent and effect of excluding competition. As to the forced combination rate, we think the jurors could properly conclude that the effect upon the average subscriber who must take thirteen papers a week is to foreclose the likelihood he will purchase other competing papers. The result on circulation of smaller papers in the area is self-evident. We find no error in the court's submission of these issues to the jury.

The Star argues that the court prejudicially erred in overruling its motion for judgment of acquittal for the reason that the evidence was insufficient as a matter of law to establish that it possessed a monopoly of the dissemination of news and advertising in Kansas City and in the surrounding territory. The Star claims that it did not have a monopoly of the dissemination of news and advertising and that effective competition existed in the dissemination of each. Size in itself does not create an unlawful monopoly within the meaning of the Sherman Anti-Trust Act, nor does that Act place a premium upon successful business operation. "The purpose of the Sherman Anti-Trust Act is the preservation of a system of free competitive economic enterprise and the protection of the public against the evils incident to monopolies * * * tending directly toward unreasonable suppression or restraints of interstate trade or commerce." 58 C.J.S. Monopolies § 17, p. 972. The Act aims to secure equality of opportunity and the protection of the public against the evils incident to monopolistic practices. If The Star here enjoyed a substantial monopoly in the dissemination of news and advertising, and used power therefrom to effectively harm or destroy free competition and did so with the intent to achieve that end, the statute has been violated. There need be no showing of absolutism. If the dominance of The Star in the news and advertising fields gave it the power to thereby effectively destroy competition and it acted with that intent, then monopolization within the meaning of the Sherman Anti-Trust Act has been established. As pointed out by Judge Learned Hand in *United*

States v. *Associated Press,* et al., D.C.S.D.N.Y. 1943, 52 F.Supp. 362, 371, and quoted approvingly by the Supreme Court in affirming that decision, *Associated Press, et al.* v. *United States,* supra, 1945, 326 U.S. 1, 17:

> "* * * monopoly is a relative word. If one means by it the possession of something absolutely necessary to the conduct of an activity, there are few except the exclusive possession of some natural resource without which the activity is impossible. Most monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; *his monopoly is measured by the handicap he can impose.*" (Emphasis supplied.)

The Star claims that it is in direct and vigorous competition with other mass media engaged in the dissemination of news and advertising and that it could not exclude them from the market or control their prices.

The indictment makes it clear that the appellants were charged with attempting to monopolize and monopolizing the dissemination of news and advertising in newspapers and on radio and television broadcasting stations in the four-county area referred to. In other words, the appellants were charged with attempting to monopolize and monopolizing trade in the media in which they did business. The Star refers to the other daily newspapers in the area and to the fact that in 1952 there were 78 weekly newspapers and suburban papers published in the four-county area which it claims disseminated news and advertising in competition with the appellant. The Star also claims that it received competition from radio and television stations, magazines, both monthly and weekly, newsreels, topical books, etc., from which it argues that the evidence was wholly insufficient to sustain the verdict that it had monopolized in the dissemination of news and advertising. What was The Star's market control and who were

its competitors? In searching for the answer to that question the appellants rely strongly on the case of *United States* v. *E. I. du Pont de Nemours & Co.*, 1956, 351 U.S. 377. In that case it was shown that du Pont produced approximately 75% of the cellophane sold in the United States, but that cellophane constituted less than 20% of all flexible packaging materials sold in the United States. The trial court found that the relevant market for determining the extent of du Pont's market control was the market for flexible packaging materials and that competition from other materials in that market prevented du Pont from possessing monopoly powers in its sales of cellophane. The Supreme Court sustained. In so doing, it stated at page 394:

> "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power. Because most products have possible substitutes, we cannot, as we said in *Times-Picayune Co.* v. *United States*, 345 U.S. 594, 612, give 'that infinite range' to the definition of substitutes. * * *
>
> But where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. * * * (page 395) *In considering what is the relevant market* for determining the control of price and competition, *no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal.*" (Emphasis supplied.)

In this case we do not think that radio stations and television stations located outside the metropolitan area herein described, magazines, newsreels, topical books, specialty publications, etc., are "market alternatives" or effective substitutes such as was meant by the Supreme Court in the

du Pont case. In that case, the Supreme Court also made clear that the market which must be examined to determine the existence of monopoly power will vary with the part of commerce under study. The considerations that go to determine The Star's relevant market must be with due regard to the realities of newspaper advertising. That is what is meant when the Supreme Court speaks about narrowing the infinite range that market substitutes could encompass. *Times-Picayune* v. *United States, supra,* at page 612. In footnote 31, at page 612 of the *Times-Picayune* case, the Supreme Court makes specific reference to the kind of market with which we are here concerned:

> "The advertising industry and its customers, for example, markedly differentiate between advertising in newspapers and in other mass media. See, *e.g.*, Frey, Advertising (2d ed. 1953), cc. 12, 15; Duffy, Advertising Media and Markets (2d ed. 1951), cc. 3, 4; Hepner, Effective Advertising, c. 20 (1949); Borden, Taylor and Hovde, National Advertising in Newspapers, *passim* (1946); Sandage, Advertising Theory and Practice (3d ed. 1948), cc. XX, XXI."

The other media mentioned by appellants were not competitors in the real sense of the word and this is true in both advertising and news. Magazines are not effective alternatives for the daily newspapers and certainly the grocer who desires to advertise a specialty in some of his items and has only The Star publications for daily use would hardly find a monthly or weekly magazine an effective substitute. In view of the dominant position The Star enjoyed in the field of advertising and news, the court's instructions on this point were nevertheless eminently fair. The court instructed the jurors that they could take into consideration the existence of a wide range of competing media to determine if The Star was in a monopolistic position, (although the relevant market was restricted to metropolitan Kansas City throughout the trial). While the court commented that weekly and neighborhood newspapers

could scarcely be considered sizeable competitors, it nonetheless ended these expressions of opinion by cautioning the jurors that such statements did not imply guilt or innocence, and that the jurors would be the final judges as to what was or was not competition. From these instructions, it is quite clear that the jurors could have considered as sizeable competitors those which the court thought were not, and that other media, with a small field of circulation compared to that of The Star, were actually a bar to monopoly.

As to The Star's claim that its position was legally acquired and was the result of superior skill, foresight and industry, we have already stated that size alone does not spell out an unlawful monopoly within the meaning of the Sherman Act. See *United States* v. *International Harvester Co.*, 1927, 274 U.S. 693, 708. It has, however, been noted that size often affords an opportunity for abuse. *United States* v. *Swift & Co.*, 1932, 286 U.S. 106, 116. There are instances innumerable where skill, foresight and industry as well as happenstance created dominance and no charge of an illegal monopoly could be predicated thereon. If the evidence here disclosed nothing more than that The Star held a position of dominance as the result of the undoubted ability, ingenuity, intelligence and industry of those who directed its activities, this case should fall. It is with the power created by that monopolistic or dominant position, the exercise of that power and the intent with which it is exercised to destroy competition with which we are here concerned. Whether there existed monopolistic power, the intent to destroy competition and the exercise of the power so to do were questions of fact for the jurors, whose province and prerogative to so determine are too often lost sight of in prosecutions of appeals from their judgments. In the last analysis, it was for the jurors to say whether The Star possessed an unlawful monopoly and whether it exercised monopolistic power with the intent and for the purpose of destroying competition. The role of the trial judge was to see that all competent evidence that was offered came before the

jury, that incompetent evidence was excluded, and that the jurors were fully instructed on the applicable law. The role that this as an appellate court has is to determine whether the trial judge committed prejudicial error in his rulings or charge and whether there was substantial evidence from which the jury might have concluded that the appellants were guilty.

In considering the question of whether or not there is substantial evidence in the record to sustain the verdicts of guilty, we bear in mind that it is not for us to weigh the evidence nor to judge the credibility of the witnesses. If there is substantial evidence in the record viewed in the light most favorable to the government, the verdicts of the jury must be sustained. *Glasser* v. *United States,* 1942, 315 U.S. 60, 80. In *Myres* v. *United States,* 8 Cir., 1949, 174 F.2d 329, 332, cert. den. 338 U.S. 849, this court said:

> "In determining the sufficiency of the evidence to support the verdict of the jury, this Court must take that view of the evidence which is most favorable to the government, and give to the government the benefit of all inferences which reasonably may be drawn in its favor. *Affronti* v. *United States,* 8 Cir., 145 F.2d 3, 5, and cases cited."

From an examination of the voluminous record, which by leave of court was printed in its entirety and submitted here, we think it perfectly clear that The Star's position in metropolitan Kansas City was of such dominance in the field in which it did business during the indictment years that it could be found by the jury that it possessed monopoly power, that it was an indispensable medium of advertising for some advertisers (See *Lorain Journal, et al.* v. *United States,* supra, 1951, 342 U.S. 143, 152), that its position gave it the power to exclude competition, and that it exercised such power for the purpose and with the intent so to do, within the meaning of the Sherman Anti-Trust Act. The Star's motion for judgment of acquittal was properly denied.

It is strenuously urged on this appeal by The Star that it was not responsible for the bankruptcy and suspension of the Journal-Post and that the trial court prejudicially erred in excluding evidence offered by The Star as to the operation of the Journal-Post and the economic and other causes for the Journal-Post's suspension and bankruptcy. The Journal-Post suspended publication during the preliminary period prior to the indictment years. The government introduced evidence with respect to appellant's coercion of advertisers who used the Journal-Post. The purpose of this evidence was to show intent and a course of conduct engaged in by The Star and by Sees that continued into the indictment period. We think the trial court was correct in excluding the proffered testimony. The reason for the failure of the Journal-Post was not an issue in this case. That failure may have been due to mismanagement, lack of skill and industry or a variety of other reasons, but whatever they were, they would not excuse the appellants' actions if such actions were a violation of the law. If The Star here was guilty of attempting to monopolize and monopolizing and Sees was guilty of attempting to monopolize, then the acts of the Journal-Post and the reasons for its demise are not a defense. To have allowed the offered testimony would have set the jurors off on a determination of an issue foreign to the real problems before them. On the other hand, the actions of the two appellants in dealing with the advertisers in the Journal-Post were competent to show intent and course of conduct. This case was not concerned with the activities of the Journal-Post but with those of the appellants and with the preservation of free competitive enterprise and whether or not there was unlawful exercise of monopoly power.

The Star also contends that the trial court erred in allowing evidence to go to the jury concerning The Star's purchase of the assets of the Journal-Post, consisting of presses, names and its newspaper morgue or library. We think the assertion is without merit and that the jurors, under the instructions of the trial court, had the right to

consider whether or not the purchase of such assets (some of which were indispensable to anyone contemplating the starting of a newspaper in that area) indicated intent, design or course of conduct on the part of The Star. We find no error in allowing the evidence to go to the jury.

As already indicated, the evidence as to Sees' attempts to monopolize in the dissemination of advertising is substantial. Sees lays particular stress on the fact that the evidence indicates and the court charged:

> "The evidence shows that the extent of his (Sees') activities was confined to the Advertising Department and the dissemination of advertising."

In the indictment he was charged in Count 1 with attempting to monopolize the dissemination of news *and* advertising, and he argues therefore that the government has failed to prove every element of the offense charged against him. Sees was director of advertising, treasurer and a member of the board of directors of The Kansas City Star Company. Advertising revenues for which he was responsible made up a vast percentage of the total income of The Star, thus supporting its news dissemination. In 1952 its revenues from advertising alone in daily newspapers, radio and television totalled $22,152,291.68,[2] with revenue from both advertising and circulation for the same year totalling $25,963,271.86.[2] Reliance in the dissemination of news upon advertising revenue is apparent. In fact, each was dependent upon the other and each without the other would fall. But aside from this, the fact that Sees meddled or attempted to meddle in the news department is borne out by the record. His threat to see that a certain baseball player's name never again appeared on the sport sheets of The Star unless certain advertising was taken out of a competitor's publication, this occurring during the preliminary period, is evidence of Sees' intent and design. The fact that that intent and

[2] Including $801,569.71 income from weekly Star Farmer not included in former figures.

design were carried over into the indictment period is justified by his threat to make or break a certain show unless a named amount was spent for advertising with The Star.

Aside from such direct instances, monopolistic control of advertising strikes at the very heart of a competitor's dissemination of news. The Supreme Court, in the *Lorain Journal* case, supra, 342 U.S. at 149, gave approval to the lower court's statement in *United States* v. *Lorain Journal Co., et al.*, E.D. Ohio 1950, 92 F.Supp. 794, 798, 799, as follows:

> "Having the plan and desire to injure the radio station, no more effective and more direct device to impede the operations and to restrain the commerce of WEOL could be found by the Journal than to cut off its bloodstream of existence—the advertising revenues which control its life or demise.
>
> • • • • • • • •
>
> • • • the very existence of WEOL is imperiled by this attack upon one of its principal sources of business and income."

In the last analysis, Sees' claim of innocence with reference to attempting to monopolize the dissemination of news is not sustained. If Sees, as the advertising director and chief person responsible for the advertising methods of The Star, so handled and manipulated the advertising as to destroy competition from the disseminators of news, it can hardly be said that he was not attempting to monopolize the dissemination of news. The effect of his advertising methods was to destroy news publications for whom advertising was their life blood.

We think this interdependence of news and advertising plus Sees' position, in addition to the instances referred to, justified the jury's verdict against him under Count 1. Denial of Sees' motion for judgment of acquittal was not error.

Complaint is made that the court's instructions to the jury misdefined the offenses of monopolization and attempt-

ing to monopolize as charged in the indictment. The jurors were told that if The Star occupied a monopoly position and that within the statutory period it committed the acts charged in the indictment with the intent to maintain its monopoly or to eliminate competition, then The Star was guilty of monopolization. They were instructed that monopolization "* * * means the possession of monopoly power by a party or parties through which power it is possible to exclude actual or potential competitors from any part of the trade or commerce among the several states, provided that he or they have the intent or purpose to exercise that power." In considering the charge as a whole, we find no fault with the court's definition.

As to the claim that the court erred in defining the offense of attempting to monopolize, Sees asserts that the essential elements of an attempt to monopolize are a specific intent to monopolize coupled with overt acts which, though not successfully monopolizing, approach so near as to create a *dangerous probability* of successful monopolization. Reliance is had on *American Tobacco Co., et al.* v. *United States,* 1946, 328 U.S. 781, 785, wherein the Supreme Court approved the trial court's definitions of the term "monopolize" and the phrase "attempt to monopolize". The approved instruction there as to "attempt to monopolize" was as follows, page 785:

> "The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, * * *."

In the instant case, the trial court told the jury that an attempt to monopolize "* * * means the employment of methods and practices which are utilized for the specific purpose and with the specific intent to achieve or build a monopoly, and which, if successful, would be likely to accomplish such monopolization." In place of "dangerous probability" the trial court used the words "would be

likely to accomplish". We do not think that the court's charge here placed a lesser burden on the government than that contained in the definition approved by the Supreme Court in the *American Tobacco Co.* case. The phrase "dangerous probability" carries with it no substantially different meaning to the average person than the phrase "likely to accomplish". Trial courts are not bound to use the specific language contained in requested instructions or in instructions approved by appellate courts, but may use their own language so long as it conveys to the jurors proper understanding and meaning. Attempts to commit crime have been defined by many courts in many ways. An attempt to monopolize has been defined as an attempt to gain control of an industry by means which prevent other men from engaging in fair competition. *United States* v. *Whiting,* 1914, 212 F. 466, 478; *United States* v. *Klearflax Linen Looms, Inc.,* 1945, D.C. Minn., 63 F.Supp. 32, 41. Here the trial court's requirement of a finding of "specific intent" plus likelihood of accomplishment is certainly tantamount to the "dangerous probability" in the definition relied on by Sees. In the *American Tobacco Co.* case, the Supreme Court was merely approving the trial court's definition but was not saying that that exact language had to be used in all such instructions. In the *American Tobacco Co.* case, containing the definition relied on by Sees, the Supreme Court specifically stated at page 811:

> "The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded *but that power exists to raise prices or to exclude competition when it is desired to do so.*" (Emphasis supplied.)

Where the charge is that of monopolization, it is necessary only to establish the existence of an intent to monopolize coupled with monopoly power. In *United States* v. *Griffith,* 1948, 334 U.S. 100, the Supreme Court stated at page 106:

> *"Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised.* For § 2 of the Act is aimed, *inter alia,* at the acquisition or retention of effective market control. See *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 428, 429. Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of § 2 provided it is coupled with the purpose or intent to exercise that power. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809, 811, 814. It is indeed 'unreasonable, *per se,* to foreclose competitors from any substantial market'. *International Salt Co.* v. *United States,* 332 U.S. 392, 396. The anti-trust laws are as much violated by the prevention of competition as by its destruction. *United States* v. *Aluminum Co. of America,* supra. It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor is unlawful." (Emphasis supplied.)

See also *Schine Chain Theatres, Inc., et al.* v. *United States,* 1948, 334 U.S. 110, 130; *United States* v. *Paramount Pictures, Inc., et al.,* 1948, 334 U.S. 131, 174; *United States* v. *United Shoe Machinery Corp.,* 1953, 110 F. Supp. 295, aff'd 347 U.S. 521.

Appellants claim that the *Griffith* case and other cases relied on by the government do not support the government's contention here in that those cases are conspiracy cases. That is but to argue that the cases cited place an individual monopolist in a much more favorable position than several who act together in a conspiracy. If the essential elements of the offense of monopoly are present,

the law applies, whether the prosecution is against one or several acting in concert. We think that is made clear by the Supreme Court's language in the *Griffith* case. Therein the Supreme Court specifically points out that Section 2 of the Sherman Act is not restricted to conspiracies but *makes it a crime for any person to monopolize or attempt to monopolize,* and in the next sentence states, at page 107:

> "* * * monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised."

But be that as it may, the trial court here went farther and required the jury, before a verdict of guilty could be returned, to find three elements: 1, Existence of monopoly power; 2, intent to monopolize; 3, performance of the acts charged in the indictment within the three-year period. We think the charge was eminently fair to both appellants.

It is claimed that the trial court made prejudicial comments in his charge to the jury. We find no justification for that assertion. A federal judge has a right to fairly comment upon the evidence and even to express his opinion thereon, provided he makes clear that the ultimate fact determinations are for the jurors. *Quercia* v. *United States,* 1933, 289 U.S. 466, 469. In *Buchanan* v. *United States,* 8 Cir., 1926, 15 F.2d 496, 498, this court clearly set out the limitations on judicial comment in jury instructions:

> "Under the rule, as stated and applied by the Supreme Court, it seems that, when a judge expresses his opinion as to the facts to the jury, making it clear that it is nothing but his opinion, and not binding upon them in any way, and that it is their duty and responsibility to determine all of the facts, he is within his rights, and that he is only subject to reversal when his comments upon the evidence or opinion as to the facts amount to partisan argument

or advocacy, or constitute an appeal to passion or prejudice."

We believe that the charge here, examined in its entirety, which is as it should be, fairly and fully apprised the jury of the applicable law and that the trial court's comments on the evidence were sufficiently guarded to come within the limitations referred to. The jurors were told that they were supreme in determining the facts and that their determinations were binding upon the court. As if to doubly impress them with the idea that their responsibility was to be exercised without restraint and to make the point clear beyond cavil, the court explained further:

> "In the Federal Courts, as distinguished from the State Courts, in charging the jury as to the law, the Court has the right to express an opinion with respect to or comment upon the evidence. It is the duty of the Court to charge the jury as to the law and the Court may advise the jury as to the facts. There may be instances during this charge when the Court may make some comment upon the evidence, or express some opinion in regard to it, or you may infer from the Court's language that the Court may have some view relating to the evidence, but I have stated to you heretofore that you are the finders of the facts; you are the sole judges of the credibility of the witnesses and of the weight and value you will place upon their testimony, and I charge and admonish you that if there is any expression of opinion or comment upon the evidence by the Court, it is not binding upon you in a determination of such facts. It is simply the expression of the Judge, and it is not meant to invade your province as the finders of the facts."

We find no error in the court's comments.

CONCLUSION

Finally, it is contended that this prosecution endangers the freedom of the press guaranteed by the First Amendment, and that "* * * A newspaper is intimidated if it is subject at any moment to prosecution under the Sherman Act whenever it opposes or antagonizes those public officials in power". The suggestion that freedom of the press requires immunity from law to which the general public is not exempt is not new. The Supreme Court, in *Associated Press* v. *N.L.R.B.*, 301 U.S. 103, 132-133, said:

> "The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. *He is subject to the anti-trust laws"* (Citing *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co., et al.*, 1934, 293 U.S. 268.) (Emphasis supplied.)

The words of Mr. Justice Black eloquently answered a similar contention in *Associated Press, et al.* v. *United States,* supra, 1944, 326 U.S. 1, 20:

> "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press

is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."

The theory of equal justice under law does not admit to the proposition that there is one brand of justice for some people and a different brand for others. Publishers of newspapers must answer for their actions in the same manner as anyone alse. A monopolistic press could attain in tremendous measure the evils sought to be prevented by the Sherman Anti-Trust Act. Freedom to print does not mean freedom to destroy. To use the freedom of the press guaranteed by the First Amendment to destroy competition would defeat its own ends, for freedom to print news and express opinions as one chooses is not tantamount to having freedom to monopolize. To monopolize freedom is to destroy it.

We have considered the many other claims of error presented by the appellants and find them to be repetitious or without substantial merit.

Affirmed.

A true copy.

Attest:

E. E. Koch,
Clerk, U. S. Court of Appeals, Eighth Circuit.

(Seal)

Appendix B.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

SEPTEMBER TERM, 1956.

No. 15456.

Wednesday, January 23, 1957.

THE KANSAS CITY STAR COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

January 23, 1957.

FILED
MAY 10 1957
JOHN T. FEY, Clerk

No. 986

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

EMIL A. SEES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

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May 10, 1957

E. L. MENDENHALL, INC., 1108 OAK STREET, KANSAS CITY 6, MO., HARRISON 1-3030

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. .....

EMIL A. SEES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Emil A. Sees petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on January 23, 1957.

The judgment below relates to the conviction of the petitioner for allegedly attempting to monopolize the dissemination of news and advertising in a four-county area including and surrounding Kansas City, Missouri. That conviction was affirmed by the Court of Appeals for the Eighth Circuit.

This case is a companion case to *The Kansas City Star Company* v. *United States of America*. The two cases were tried together. Separate judgments were entered and separate appeals were taken on the same record.

Review by this Court of the decision herein is of great importance for the same reasons as in the *Star* case, and the considerations which necessitate the granting of certiorari, which are stressed in the petition in behalf of the Star, will not be repeated, but appropriate reference will be made in this petition to the separate petition of the Star.

The conviction of petitioner and the affirmance thereof present additional separate questions of great importance in the administration of the federal criminal law in complex antitrust prosecutions such as this case.

Opinions Below.

The opinion of the District Court denying defendants' motion to set aside the verdict of guilty and for judgment of acquittal or in the alternative for a new trial is printed at pp. 324-9 of the record. The opinion of the Court of Appeals is reported in 240 F. 2d 643, and is printed as Appendix A hereto.

Jurisdiction.

The judgment of the Court of Appeals is dated and was entered on January 23, 1957, and is printed as Appendix B hereto. The petition for rehearing was duly filed on February 11, 1957; the order denying the petition for rehearing is dated March 13, 1957. On April 2, 1957, Mr. Chief Justice Warren extended the time within which to file a petition for a writ of certiorari to and including May 12, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

Questions Presented.

In addition to the questions presented in the Star's petition for certiorari, this case presents the following important questions:

1. Can petitioner be guilty of an attempt to monopolize solely by reason of the existence of the Star's unit advertising rate policy which was erroneously viewed as a tying arrangement, which petitioner did not establish and could not alter, and without any consideration being given to the proven legitimate business aims which this Court in *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, held to justify the practice?

2. Should the field of competition with respect to the dissemination of news and advertising be restricted to daily newspapers and radio and television stations physically located or published in metropolitan Kansas City, or should it also include non-dailies, magazines, other periodicals, direct mail advertising and other media in metropolitan Kansas City, as well as radio stations located outside Kansas City and publications published outside Kansas City which disseminate news and advertising therein?

3. The charge to the jury contained the following definitions of the offense charged:

> "An attempt to monopolize, as used in Count I of the indictment, means the employment of methods and practices which are utilized for the specific purpose and with the specific intent to achieve or build a monopoly, and *which, if successful, would be likely to accomplish monopolization.*" (R. 2443-4) (Emphasis added).
>
> " 'Specific intent' means that the defendants must have done certain things with monopoly as their ob-

jective, *which, if successfully performed, could result in actual monopolization.*" (R. 2447) (Emphasis added).

Did such instructions require only a mere possibility rather than a dangerous probability, of successful monopolization essential to conviction of an attempt to monopolize?

4. Was petitioner wrongfully convicted of attempting to monopolize the dissemination of news by newspapers and the dissemination of news and advertising by radio and television by imputing liability to him for acts not done by him or under his direction?

5. In a lengthy, complex, non-conspiracy antitrust prosecution, is the right of an individual defendant to a fair trial adequately safeguarded by a joint trial with a corporate defendant in which most of the charges and evidence were inapplicable to the individual, the rulings on admissibility of evidence were often erroneous or confusing, and in which the court submitted all charges (except one) to the jury against the individual?

Statute Involved.

The statute involved is Section 2 of the Sherman Act, 15 U. S. C., Sec. 2, which at the time of the indictment read as follows:

> "§ 2. *Monopolizing trade a misdemeanor; penalty.*
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Statement.

As the petition in the *Star* case points out, the decision below involves grave and far-reaching consequences to the entire newspaper industry. The decision also involves questions of fundamental and widespread significance in the administration of justice in protracted, complex criminal prosecutions such as this case. Involving as it does the regulation of business conduct under the Sherman Act, its impact will be felt not merely by petitioner but by virtually every newspaper and every businessman doing interstate business in the United States. Petitioner was indicted, tried and convicted, as a principal, of the substantive offense of attempting to monopolize portions of trade and commerce with which he had no connection whatever.

Petitioner Was Convicted by Imputing to Him Criminal Responsibility for Acts Not Done by Him or under His Direction.

Petitioner is Director of Advertising and a Director of the Star. Prior to 1950 his duties were confined solely to the local advertising section of the Advertising Department (R. 2267-9).

He has had no connection with or supervision over *news gathering or dissemination*. The Star has a separate editorial and news department under the supervision of other officers. Petitioner was concerned solely with the advertising phase of the newspaper operation.

The Star also operates radio station WDAF and television station WDAF-TV at a separate location. Each of these stations has its own organization, does substantial business and is operated separately from the newspaper Each has its own advertising solicitation department (R. 2267-9, 2343).

In spite of this, petitioner was charged with and convicted of attempting to monopolize the dissemination of *news* and advertising through newspapers, radio and television (R. 8-9). Such a conviction was possible only by failing to require proof of the essential elements of the charges and by imputing to petitioner criminal liability for conduct as to which he was a perfect stranger.

This is not a conspiracy case in which the acts or statements of one conspirator may be imputed to all nor did the indictment charge merely an unreasonable restraint of trade.

The Field of Competition.

The field of competition was so defined as to exclude other mass media in competition with the Star. The indictment defined an arbitrarily and artificially narrow market or area of competition. The District Court adopted as a matter of law (and in effect further limited) the narrow market chosen by the Government. (We refer to and incorporate by reference the petition in behalf of the Star, pp. 6-15.)

Unit Advertising Rates.

The District Court permitted the jury to convict petitioner on the basis of the unit advertising rate policy of the Star *alone* (R. 2452-6). In *Times-Picayune Pub. Co. v. United States,* 345 U. S. 594, this Court held that the legitimate business aims which motivated the use of unit advertising rates negatived the inference of the specific wrongful intent essential to an attempt to monopolize. But the District Court in this case did not submit to the jury the issue of legitimate business aims, and permitted the jury to convict in the absence of this essential element of the offense (R. 2452-6).

The record is replete with uncontroverted evidence which clearly established the legitimate business motivations with which the Star continued the unit advertising rate policy established by its predecessor fifty years ago.[1] As this Court found in the *Times-Picayune* case this unit rate policy is followed by practically all newspapers having morning and afternoon issues. It does not constitute tying and constitutes no evidence of intent to monopolize. (Petition of the Star, pp. 16-23).

There was likewise no dispute concerning the fact that petitioner had not established the unit advertising rate policy and he personally had no power or authority to change that policy (R. 1855-6, 2401-2, 2405-6).

Petitioner Was Unfairly Tried and Convicted.

The Joint Trial Unfairly Prejudiced Petitioner's Rights.

Petitioner's motion for severance was overruled and he was tried jointly with the Star (R. 254-6). In addition to the charges concerning news, radio and television, many of the other purported charges in the indictment did not involve solicitation of newspaper advertising and were inapplicable to petitioner (R. 3-14). These included charges with respect to credit, the unit combination subscription rate policy, low subscription rates for the Star, the acquisition of certain assets from the bankrupt estate of the Journal, and other purported charges (R. 9-12).

The joint trial lasted over five weeks. More than one hundred witnesses testified and several hundred exhibits were introduced. The transcript comprises over 4,000 pages

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[1]DX 30, 77, R. 2873-9, 3068x-78; R. 1811-21, 2078-9, 2199-2200; DX 25(a), 25(b), 25(c), 35(a), 35(b), 35(c), 35(d); R. 2861-5, 2883-9; R. 626-7, 1784-1811, 1827-45; DX 27-29, R. 2868-72; R. 1100, 1821, 2081-2, 2394-7.

exclusive of exhibits and the printed record consists of ten volumes and exceeds 3,000 pages. Only a small portion of the 91 Government witnesses gave testimony which related to petitioner, and fewer than one-half of the Government exhibits were admitted as to him.[2] Throughout the trial, however, petitioner's name figured in much of such incompetent evidence, because of his executive position at the Star.

In response to objections to such evidence in behalf of Sees, the trial court frequently instructed the jury that such evidence should not be considered against Sees "unless connected up" with him or unless it applied to him. But the court never indicated what evidence had been connected up or how the jury should determine whether such evidence had subsequently been connected up.

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[2]None of the testimony of the following witnesses was admitted as to Sees: Aronoff, R. 371; Scott, R. 422; Weiss, R. 449; Fluke, R. 456; Frazier, R. 496; Weiss, R. 565; Sevra, R. 617; Strafer, R. 629; Pickerell, R. 641; Sosland, R. 666; Nelkin, R. 704; Stallings, R. 711; Levinson, R. 722; Rolsky, R. 739; Lapides, R. 743; Durbin, R. 765; Anderson, R. 777; Cumonow, R. 894; Braun, R. 902; Rendigs, R. 909; Bebb, R. 934; Reynolds, R. 965; Tait, R. 971; Gerling, R. 984; Jones, R. 994; Caldwell, R. 1032; Smith, R. 1103; Baier, R. 1113; Nixon, R. 1125; Dickinson, R. 1134; Wangerin, R. 1141; Cox, R. 1153; Rose, R. 1175; Taylor, R. 1207; Burns, R. 1232; Price, R. 1293; Raley, R. 1306; Stockwell, R. 1314; Wight, R. 1320; Hartman, R. 1328; Harper, R. 1338; Evans, R. 1345; Peaster, R. 1364; Manson, R. 1371; Mindlin, R. 1404; Gary, R. 1418; Hardy, R. 1430; Tidwell, R. 1436; Russell, R. 1450; Pierson, R. 1473; Higgins, R. 1484; Whalen, R. 1495; Lorenzen, R. 1542; Potter, R. 1568; Weiss, R. 1571; McLeod, R. 1574; Smith, R. 1589; Mnookin, R. 1649; Pautz, R. 1668.

In at least 135 instances the court sustained Sees' objections, "unless connected up," or in some other manner: Herbert R. Aronoff, R. 379, 380, 381, 386, 390, 391; Paul Scott, 431, 435, 436, 438, 442; Richard A. Fluke, 459-60, 461; Tom Crawford, 464, 466, 467; Robert J. E. Frazier, 505, 506; Harry Weiss, 569, 571; Pierce Adams, 575, 586, 587; Lee Graves, 610; Richard Strafer, 632; Wayne

The Court Erroneously Submitted to the Jury All Charges and All Evidence Against Petitioner.

In its final charge, the court read and submitted to the jury every charge in the indictment, including those not connected with petitioner, with the possible exception of the unit subscription rate (R. 2436-61). At least sixteen times during the charge the court erroneously submitted to the jury evidence and charges inapplicable to petitioner by repeated use of such terms as "defendants," "either or both defendants," "they," "their actions," "parties," etc. (R. 2445, 2448, 2448-9, 2450, 2451-2). In addition the court charged the jury that it could consider "all evidence" of acts prior to 1950 on the issue of intent, "all of the acts committed during 1950-53," "all of these facts," "all the other evidence in the case," "all of this evidence" against petitioner (R. 2445, 2448, 2449, 2451-2). The court also read to the jury every purported charge in the indictment as applicable to petitioner (R. 2441-43).

Pickerell, 642, 644, 647, 648, 651; Benjamin Sosland, 675; Henry G. Nelkin, 706; Wm. R. Stallings, 715, 716-7; J. Levinson, 724, 733, 735; Emanuel Rolsky, 741; Joseph Lapides, 744, 748, 752, 757; Geo. B. Durbin, 767, 768-9, 773; C. Gordon Anderson, 780-1, 782, 790, 797; John Maitland Cook, 854-5, 861, 862, 865, 867, 868-9; Lloyd Winters, 874; Louis A. Cumonow, 896; Paxton D. Rendigs, 910-911, 913, 915, 917; Alexander Clark, 920, 922; Mrs. Chas. Bebb, 936, 937, 938; Philip J. Troy, 944; O. R. Reynolds, 969; Herbert B. Tait, 973, 976; Henry Gerling, 985, 986-7, 989; C. C. Jones, 995; R. B. Caldwell, 1032-3, 1034, 1035; Chas. K. Walden, 1046-7, 1055; Ralph J. Smith, 1104, 1108; Abe Baier, 1115, 1119-20; James Nixon, 1127; Glen W. Dickinson, 1136; Richard Wangerin, 1147, 1151-2; Stanley Rose, 1176, 1179; Kurt Levi, 1183, 1184-5; Vincent Crimmons, 1192, 1194; Ruth Seufert, 1200, 1219, 1222, 1223; Ralf L. Burns, 1233, 1236; Harry B. Greenberg, 1245; John H. Stark, Jr., 1270, 1274, 1276-7, 1278; Harold O. Price, 1295; Gene Raley, 1307-8; Gale Stockwell, 1315; Paul P. Wight, 1322, 1325; Edwin C. Hartman, 1330, 1335; Norman Harper, 1340; Tom L. Evans, 1346-7, 1363; Norman Peaster, 1367; N. E. Manson, 1390; Stanley L.

The Court Substituted Mere Possibility for Dangerous Probability in Defining Attempt to Monopolize.

The court's charge also misdefined the offense of attempted monopolization by instructing the jury that a mere likelihood or possibility of success was all that was necessary to convict petitioner (R. 2443-4).

The Court of Appeals affirmed the conviction and denied petitioner's petition for rehearing.

Reasons for Granting the Writ.

I.

The Rulings on Unit Advertising Rates Conflict with Times-Picayune Pub. Co. v. United States, 345 U. S. 594, and Syracuse Broadcasting Corp. v. Newhouse, 236 F. 2d 522 (2nd Cir., 1956).

The decision herein conflicts with the controlling decision in *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, which was more recently followed by the Court of Appeals for the Second Circuit in *Syracuse Broadcasting Corp.* v. *Newhouse,* 236 F. 2d 522 (2nd Cir., 1956). The

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Mindlin, 1406, 1408, 1411; Nell Gary, 1420, 1423; Myer Weneck, 1428; James Hardy, 1431-2; Ronald Tidwell, 1440, 1442; Luke Russell, 1456; James W. Coy, 1459; Homer Pierson, 1475; Delbert Ewing, 1488-9; Leo M. Weiss, 1573; J. E. McLeod, 1578, 1579; Leo Smith, 1594, 1596, 1600; Russell Swanson, 1608; Harrison Houghton, 1624, 1626-7; Robert Goodfriend, 1639, 1641, 1644, 1647-8; I. J. Mnookin, 1650, 1651; Frederick Harpst, 1657; Homer Pautz, 1669, 1674; Harrison Houghton, 1690-1.

Government exhibits not admitted as to Sees include: GX 3, R. 2543; 12, R. 2553-4; 13, R. 2554-5; 23, R. 2555-7; 24, R. 2558-9; 29-32, R. 2563-9; 33-42a, R. 2571-91; 43-45, R. 2593-2603; 46-59, R. 2605-59; 60-71, R. 2661-2707; 73-75, R. 2709-13; 137, R. 2735; 138, R. 2737-8; 140, R. 2739-41; 145, R. 2746-8; 146, R. 2748-9; 147, R. 2749-51; 157, R. 2758; 158, R. 2759; 160, R. 2761; 162, R. 2763-75; 172, R. 2776; 175, R. 2779-80; 176, R. 2780.

trial court instructed the jury that petitioner could be convicted on the basis of the existence of the unit advertising rate practice alone. The court summarized its lengthy instruction on this issue as follows (R. 2456):

> "In short, you are instructed that if you find that the defendants used the forced combination arrangement between two newspapers, and that the papers or either of them were dominant, and that such practice was intended to achieve or maintain monopoly, then I instruct you that you would be justified upon that evidence alone in returning a verdict of guilty * * *."

The instruction thus submitted to the jury only three conditions as a prerequisite to petitioner's guilt: (1) that the combination arrangement was used by two newspapers, (2) that either or both of them were dominant, and (3) that the practice was "intended to achieve or maintain monopoly."

Here, as in *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, and *Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522, the theory of the tying cases was *inapplicable*. But the theory was erroneously used to convict petitioner.

Legitimate Business Aims.

As in the *Times-Picayune* case, legitimate business aims motivated the continuation of the unit advertising rates.

The evidence in the present case clearly and indisputably established that simplification of operations, increased efficiency, reduced costs and rates, etc., motivated the continuation of the unit advertising rates by the Star. (See pp. 18-19 of the Star's petition, incorporated by reference herein.) There was no evidence to the contrary. Indeed, the

evidence here was virtually identical with the evidence relied on by this Court in ruling in the *Times-Picayune* case that the Government had failed as a matter of law to prove specific intent. The established and uncontroverted business reasons underlying the use of unit advertising rates are antithetical to a specific intent to monopolize.

The trial court, however, did not submit to the jury this question, which under the controlling decision in the *Times-Picayune* case was dispositive of the charge of attempt to monopolize (R. 2452-6). On the contrary, the instruction does not even mention legitimate business aims.

No Specific Intent.

The existence of the unit advertising rate practice was not disputed. It applied only to general and classified advertising, as in *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594 (GXs 43-71, R. 2593-2707). It was established more than fifty years ago by a predecessor of the Star Company (R. 1791, 1844). Petitioner neither established the policy nor could he have changed or abolished it (R. 1856, 2401-2, 2405-6).

The only evidence relied on by the Court of Appeals (App. A, p. A24) (and there was no other evidence) was that a few advertisers complained of the unit rates. The same type of evidence, multiplied many times, was introduced and relied on by the trial court in the *Times-Picayune* case, 105 F. Supp. 670, 674-76. This Court, however, reversed the judgment against the Times-Picayune thus ruling such evidence insufficient as a matter of law to prove specific intent. On the issue whether the unit advertising rates there involved constituted an attempt to monopolize, the ruling of the Court was clear and categorical (pp. 626-7):

"An insufficient showing of specific intent vitiates this part of the Government's case.

* * *

"* * * only the adoption of the unit rates remains to support the alleged violation of § 2 of the Sherman Act. Since we have viewed that step as predominately motivated by legitimate business aims, this record can not bear out the specific intent essential to sustain an attempt to monopolize under § 2."

We submit that the instruction irreconcilably conflicts with the ruling in *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594.

The other errors, misstatements and omissions in the charge concerning unit advertising rates, which squarely conflict with the *Times-Picayune* case, and which are common to both petitioners, are more fully discussed in the separate petition in behalf of the Star and are incorporated herein by reference (pp. 16-23).

The effect of the Court of Appeals' decision in this case with respect to unit advertising rates is to transform the heretofore legitimate unit advertising rate practice into a *per se* antitrust offense. If sound business considerations are ruled out wherever unit advertising rates are utilized, businessmen will no longer be able to operate their businesses on a sound, efficient basis. But these considerations have always been highly relevant, if not controlling, in determining whether an attempt to monopolize exists. (See *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594; *United States* v. *Columbia Steel Company*, 334 U. S. 495 (1948); *United States* v. *Yellow Cab Company*, 338 U. S. 338, affirming 80 F. Supp. 936 (N. D. Ill., 1948). Cf. *Board of Trade of City of Chicago* v. *United States*, 246 U. S. 231 (1918).) (See also pp. 18-19 of the petition of the Star incorporated herein by reference.)

II.

The Market Rulings Conflict with the du Pont Cellophane Case and Other Decisions.

The District Court defined the market as a matter of law, rather than submitting this issue to the jury as an issue of fact, and arbitrarily delineated the market so narrowly as to conflict with the decision of this Court in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377. The rulings giving rise to this conflict are more fully discussed in the petition of the Star, pp. 12-14, which are referred to and incorporated herein.

The importance of a correct definition of the relevant market in a Section 2 case cannot be over-emphasized. See *Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522 (2nd Cir., 1956). If the Government is permitted to define the market narrowly enough, every sizeable business could be subject to prosecution as a monopolist or an attempted monopolist as to some portion of its business. And so could every small business or country store which happens to be the only business in its neighborhood.

Market definition is particularly important to the newspaper industry, inasmuch as over 92% of all daily newspapers published in this country are the only dailies in their respective communities. It is vitally important in the administration of the antitrust laws that the realities of competition which such newspapers face be given full recognition in defining the competitive market in which they operate.

III.

Petitioner's Conviction Was Not Based on His Personal Conduct, but Resulted from the Erroneous Application of the Civil Doctrine of Vicarious Liability.

Petitioner's conviction herein was made possible only by the erroneous application of the civil doctrine of imputed or vicarious liability. Petitioner was charged with and convicted of attempting to monopolize the dissemination of news and advertising in interstate commerce in a product or services market consisting of newspapers, radio and television (Indict., Pars. 6, 23, 26 and 29; R. 5, 8-9, 13).

Petitioner had no duties or responsibilities connected with the gathering or dissemination of news. Indeed, petitioner's evidence showed that monopolization (and hence attempted monopolization) of the dissemination of news was an impossibility (R. 2255-6). There was no evidence within the indictment period tending to connect petitioner with any aspect of the Star's radio or television operations.

But this Court has repeatedly held that, "Guilt with us remains individual and personal even as respects conspiracies." See *Kotteakos* v. *United States*, 328 U. S. 750, 772. It is axiomatic that, in the absence of conspiracy, there can be no criminal liability without fault, even though the accused may be a corporate executive. *Paschen* v. *United States*, 70 F. 2d 491, 503 (7th Cir., 1934); *United States* v. *Food & Grocery Bureau*, 43 F. Supp. 966 (S. D. Cal., 1942).

The theories adopted by the Government and the courts below in sustaining petitioner's conviction that petitioner was a corporate executive and that advertising and news are interdependent are nothing more than attempts to impute criminality to petitioner on bases other than his own personal conduct.

IV.

The Definition of Attempt to Monopolize Conflicts with Swift & Co. v. United States, 196 U. S. 375, and American Tobacco Co. v. United States, 328 U. S. 781, and with Decisions of Other Courts of Appeals.

The most fundamental question which arises in every action instituted under the antitrust laws concerns the proper definition of the elements of the offense alleged or charged. This problem is necessarily involved in every phase of the proceeding, and is basic to questions concerning the sufficiency of the pleadings, the scope of discovery procedures (in a civil action), the issues to be tried, the admissibility of evidence, and finally, and most important of all in a criminal prosecution, in the instructions to the jury. The final charge to the jury is so important that, whether or not so requested, the trial court must specifically, accurately and clearly instruct the jury concerning every element of the offense charged, and any error in this respect is deemed prejudicial and reversible *per se*. *Morissette* v. *United States*, 342 U. S. 246, 274.

Thus, the conflict created in this case by the trial court's erroneous definition of attempt to monopolize, which received the approval of the court of appeals, is a conflict on an issue vitally important in every step of every antitrust case involving an alleged attempt to monopolize, and is particularly important in the present case.

Since the decision in *Swift & Co.* v. *United States*, 196 U. S. 375 (1905), the law has been settled that proof of a dangerous probability of monopolization is essential to an unlawful attempt to monopolize. *Lorain Journal Co.* v. *United States*, 342 U. S. 143; *American Tobacco Co.* v. *United States*, 328 U. S. 781; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2nd Cir., 1945); *Mackey* v. *Sears*,

Roebuck & Co., 237 F. 2d 869, 873 (7th Cir., 1956). It is equally clear that acts and practices by a single trader in a competitive market which it could not successfully monopolize if all of such acts and practices were successful, involve at most mere incipient restraints which do not rise to the level of attempts to monopolize cognizable under Section 2 of the Sherman Act.[8]

The charge in this case squarely conflicts with principles established in the *Swift & Co.* case and other cases, *supra*. The trial court charged the jury that an attempt to monopolize required only specific intent together with the employment of methods and practices "which if successful would be *likely* to accomplish monopolization" (R. 2443-4) (Emphasis added). The court gave additional emphasis to this instruction by repeating it a second time. The instruction defining "specific intent" only emphasized the other erroneous definition for it stated that, " 'Specific intent' means that the defendants must have done certain things with monopoly as their objective which, if successfully performed, *could* result in actual monopolization" (R. 2447) (Emphasis added).

Thus, a mere possibility was substituted for the *dangerous probability* essential to an attempt to monopolize. Even Section 2(a) of the Clayton Act, which is aimed at "incipient incipiency," and which requires only that the effect of a prohibited discrimination "*may be*

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[8]Conduct which does not rise to the level of an attempt to monopolize might, of course, be subject to Section 1 of the Sherman Act, or to the provisions of the Clayton Act aimed at incipient restraints, for the very purpose of the Clayton Act is to reach incipient restraints which is not proscribed by the Sherman Act. 15 U. S. C., Sec. 12, *et seq.*; *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 355-6 (1922). See also *Times-Picayune Pub. Co. v. United States*, 345 U. S. 594 (1953). But this case involves only Section 2 of the Sherman Act.

substantially to lessen competition," is not violated where no more than a mere possibility of harm exists.[4]

The definition of attempt to monopolize thus conflicts squarely with principles adhered to since *Swift & Co.* v. *United States*, 196 U. S. 375, 402. It fails to recognize and to outline clearly the vital difference of *degree* between a mere preparation or mere possibility and a punishable attempt. The question of what conduct advances far enough towards success to constitute a punishable attempt to monopolize is in essence a "question of proximity and degree." *Swift & Co.* v. *United States*, 196 U. S. 375, 402. By eliminating that vital question from the jury's consideration, or by failing to spell out this basic distinction in the clearest possible terms, the trial court permitted the jury to convict on the basis of an improper definition of the offense charged.

"A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States*, 326 U. S. 607, 613 (1946); *Bloch* v. *United States*, 223 F. 2d 297, 298 (9th Cir., 1955).

V.

Petitioner Was Denied a Fair Trial.

No conspiracy was charged in this case. Petitioner could not, therefore, be convicted in a criminal case for the conduct of others which he did not direct, authorize or participate in. The doctrine of agency or imputed liability has no application here.

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[4] "* * * the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." *Corn Products Refining Co.* v. *F. T. C.*, 324 U. S. 726, 738 (1945). See also *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 46; *Standard Fashion Co.* v. *Magrane Houston Co.*, 258 U. S. 346, 356-7.

Petitioner's Basic Rights Were Prejudiced by the Joint Trial.

The length and complexity of the trial, and the District Court's frequent, confusing rulings that evidence was not admitted against petitioner, unless "connected up" or unless it applied to him, made it impossible for the jury rationally to segregate and consider against petitioner only that evidence competent against him.

In these circumstances the problems of preventing the improper transference of impressions of guilt and guilt by association became virtually insurmountable. Prejudice in such a situation results not from a single erroneous or confusing ruling, nor from the admission and improper consideration by the jury of a single or a few incidents, but from an aggregation of such incidents throughout the course of the protracted five-week trial. It taxes credulity to conclude that a lay jury, or anyone else for that matter, could have any rational conception of the evidence competent against petitioner.

The Submission Against Petitioner in the Final Instructions of Many Charges Not Connected with Him Denied Him a Fair Trial.

It is very doubtful whether the clearest of instructions to the jury could have eliminated the confusion by the conclusion of the five-week trial. The instructions which the trial court gave with respect to petitioner were neither clear nor correct. Throughout the instructions the trial court dealt with both defendants indiscriminately. The court read all of the charges against both petitioner and the Star although most of the charges were never connected with petitioner. Then the court specifically applied every one of its instructions, except the instruction dealing with unit subscription rates, against both petitioner and the

Star. No fewer than twenty times during the charge the court instructed the jury that they could consider all charges and all evidence in the case against both defendants (R. 2445, 2448, 2448-9, 2450, 2451, 2451-2, 2459).[5]

The sole instruction purporting to inform the jury as to petitioner's individual liability was given at the end of the hour-long charge (R. 2458-59). We submit that it was totally ineffective when considered with the entire remainder of the charge and in light of the confusing developments of the protracted trial. See *Krulewich* v. *United States*, 336 U. S. 440, 453 (1929); *Nash* v. *United States*, 229 U. S. 373, 380 (1913); *United States* v. *Central Supply Ass'n*, 6

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[5]Typical examples are:

"However, I instruct you that you should consider this evidence of surveillance in the light of *all the other evidence in the case*, in deciding whether it was so extensive and proceeded to such an extent as to be indicative of an intent and purpose to secure for the *defendants* such a share of available business * * *." (R. 2448) (Emphasis added).

* * * * *

"* * * If you find and believe from the evidence that *either or both of the defendants*, with the purpose of creating or maintaining a monopoly, dictated to prospective advertisers that they could advertise through the newspaper, *radio* or *television* media of The Kansas City Star Company only upon certain conditions which worked commercial harm to other publications to the extent that it constituted an attempt to monopolize or monopolization by *defendants*, then you must find *either or both of the defendants* guilty of an attempt to monopolize and guilty of monopolization." (R. 2450) (Emphasis added).

The court concluded its instructions, after purporting to instruct as to petitioner's individual liability, as follows:

"* * * if you find beyond a reasonable doubt that the defendant Emil A. Sees committed *the acts as charged to him in Count I of the indictment* and described to you in this charge within the period January 7, 1950 to January 6, 1953, with the specific intent to monopolize the dissemination of news and advertising in the metropolitan area of Kansas City as defined in this charge, then you will return a verdict of 'guilty' against the defendant Sees on Count I of the indictment." (R. 2459) (Emphasis added).

F. R. D. 526, 533-4 (N. D. Ohio, 1947); *United States* v. *Standard Oil Co.*, 23 F. Supp. 937, 939 (W. D. Wis., 1938); *United States* v. *Haupt*, 136 F. 2d 661 (7th Cir., 1943); *Schmeller* v. *United States*, 143 F. 2d 544, 550 (6th Cir., 1944).

This Court held in *Nash* v. *United States*, 229 U. S. 373, 380, that the failure specifically to withdraw charges not supported by evidence is vital and reversible error (p. 380):

> "The fifth, sixth and eighth statements of means to be employed were withdrawn from the jury, but the jury's attention seems not to have been called to the fact that some of the charges were abandoned, in the connection in which it was important. * * * It is unnecessary to consider whether there was any evidence sufficient to warrant a conviction upon some of the other means alleged, for instance the first, as the absence of such evidence only would add another reason for holding the instructions wrong upon a vital point."

A fair trial depends upon the ability of the jury to follow instructions. *Opper* v. *United States*, 348 U. S. 84, 95 (1954). However, it is for ordinary lay minds, not for psychoanalysts that our rules of procedure, evidence and instructions are framed (*Shepard* v. *United States*, 290 U. S. 96, 104). It is equally true that our jury system is based upon and presupposes the ability of the jury to grasp and retain the evidence and reach rational conclusions therefrom, and upon the trial court's making the rulings on evidence, the procedures and the instructions so clear and comprehensible that a lay jury will be able properly to perform its function.

Petitioner's Conviction Presents Questions of Vital Importance Concerning the Administration of Federal Criminal Law.

The present case also presents for the first time in this Court important questions concerning the administration of justice in a criminal non-conspiracy antitrust case of unusual magnitude and complexity. Not until recent years have the courts and commentators fully comprehended the unique difficulties arising out of the necessity of adjudicating the legality of business practices of tremendous magnitude and complexity within the framework of our traditional judicial system. The landmark Report of the Judicial Conference of the United States on "Procedure in Antitrust and Other Protracted Cases" (1951), 13 F. R. D. 62, points up the gravity of the problems involved and suggests a number of partial solutions which may be helpful but do not wholly solve the problems.

Most of the procedures suggested in the Report are inappropriate to a criminal prosecution such as the present one. Further, the trial court here did not take advantage of the limited available procedures, such as a detailed bill of particulars and a separate trial of petitioner, which might have simplified the case and assured petitioner of a fair and unbiased hearing and determination of his innocence or guilt.[6]

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[6]Petitioner unsuccessfully moved to dismiss the indictment for fatal vagueness and for a bill of particulars (R. 2524, 121-33). Petitioner also moved in advance of trial for a severance and separate trial, on the ground *inter alia* that confusion, prejudice and injustice would result from a protracted joint trial and the inevitable admission of vast amounts of evidence incompetent against, and highly prejudicial to, petitioner, but his motion was overruled (R. 254-6).

This case calls for the formulation and application of proper standards for the enforcement of federal criminal law in protracted trials of antitrust litigation so as to assure petitioner and others similarly situated not merely the minimal requirements of due process, but the maintenance of standards of procedure and evidence which will adapt our judicial system to fair and just adjudications in trials of complex, protracted criminal cases such as this, particularly where the liberty and reputation of individuals are involved. See *McNabb* v. *United States*, 318 U. S. 332, 340-1 (1943).

Conclusion.

For the foregoing reasons and for the reasons set forth in the petition of the Star we submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 10, 1957.

APPENDIX A.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 15,456

The Kansas City Star Company, Appellant,

vs.

United States of America, Appellee.

} Appeal from the United States District Court for the Western District of Missouri.

No. 15,457

Emil A. Sees, Appellant,

vs.

United States of America, Appellee.

} Appeal from the United States District Court for the Western District of Missouri.

[January 23, 1957.]

Elton L. Marshall (Henry N. Ess, Carl E. Enggas, Colvin A. Peterson, Jr., and Watson, Ess, Marshall and Enggas were with him on the brief), for Appellant The Kansas City Star Company.

Carl E. Enggas (Henry N. Ess, Elton L. Marshall, Melvin J. Spencer, and Watson, Ess, Marshall and Enggas were with him on the brief), for Appellant Emil A. Sees.

Earl A. Jinkinson, Attorney, Department of Justice, and Joseph E. McDowell, Attorney, Department of Justice (Edward L. Scheufler, United States Attorney, Victor H. Kramer and Daniel M. Friedman, Attorneys, Department of Justice, Victor R. Hansen, Assistant Attorney General, and Raymond P. Hernacki and Willis L. Hotchkiss, Attorneys, Department of Justice, were with them on the brief), for Appellee.

Before GARDNER, Chief Judge, and WOODROUGH and VOGEL, Circuit Judges.

VOGEL, Circuit Judge.

The Kansas City Star Company, Roy A. Roberts, its president and chairman of the Board of Directors, and Emil A. Sees, its director of advertising, treasurer and a member of the Board of Directors, were all charged in an indictment with a violation of Section 2 of the Sherman Anti-Trust Act, 15 U. S. C. A. §2. The indictment was in two counts. The first count charged that the appellants had been and were up to the time of the return of the indictment engaged in an attempt to monopolize interstate trade and commerce in the dissemination of news and advertising. In Count No. 2 the appellants were charged with a monopolization of interstate trade and commerce in the dissemination of news and advertising. Prior to trial, and on motion of the government, the indictment was dismissed as to Roy A. Roberts. After a trial, lasting from January 17, 1955 to February 22, 1955, the jury returned a verdict of guilty as to The Kansas City Star Company on both counts of the indictment and a verdict

of guilty as to Emil A. Sees on Count 1 and not guilty on Count 2. The court, concluding that the offense of attempting to monopolize as charged in Count 1 of the indictment merged into the greater offense of monopolization as charged in Count 2, imposed a single penalty of a $5,000.00 fine as to the appellant The Kansas City Star Company, hereinafter referred to as The Star. Appellant Sees, having been convicted on Count 1 only, was punished by a fine of $2500.00. Both parties separately prosecuted an appeal to this court. They were, however, indicted together, tried and convicted together, and will be considered together in this opinion, separate reference being made to each where that becomes necessary or expedient.

That portion of the statute under which the indictment was found, 15 U. S. C. A. §2, is as follows:

> "*Every person who shall monopolize, or attempt to monopolize*, or combine or conspire with any other person or persons, to monopolize *any part of the trade or commerce among the several States*, or with foreign nations, *shall be deemed guilty of a misdemeanor*, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." (Emphasis supplied.)

The Sherman Act aims at the evils of monopoly and monopolistic practices in interstate trade and commerce. That it can apply to the dissemination of news and advertising there can be no doubt. In a case quite similar to this one, the Supreme Court commented, *Lorain Journal v. United States*, 1951, 342 U. S. 143, 152:

> "The distribution within Lorain of the news and advertisements transmitted to Lorain in interstate commerce for the sole purpose of immediate and

> profitable reproduction and distribution to the reading public is an inseparable part of the flow of the interstate commerce involved. See *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309; *Stafford* v. *Wallace*, 258 U. S. 495, 516; *Illinois Central R. Co.* v. *Louisiana R. Comm'n*, 236 U. S. 157, 163; *Swift & Co.* v. *United States*, 196 U. S. 375, 398. Unless protected by law, the consuming public is at the mercy of restraints and monopolizations of interstate commerce at whatever points they occur. Without the protection of competition at the outlets of the flow of interstate commerce, the protection of its earlier stages is of little worth."

See also *Associated Press* v. *United States*, 1945, 326 U. S. 1, 14, holding trade in news among the several states to be interstate commerce.

In this appeal, both appellants allege many errors in rulings on various motions, the receipt of certain evidence, the exclusion of other evidence, and the court's charge to the jury.

Pre-Trial Orders.

At the outset, appellants moved to dismiss the indictment and each count thereof on the grounds that each count failed to state the particular act or acts charged to constitute the offense with reasonable definiteness and that each count was so vague and indefinite that it did not inform the appellants of the nature and cause of the accusation against them, thereby denying rights guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States and Rule 7 (c) of the Federal Rules of Criminal Procedure, 18 U. S. C. A.

The indictment identifies and describes The Kansas City Star Company as being a corporation and the publisher of a morning daily newspaper known as The Kan-

sas City Times, an evening daily newspaper known as The Kansas City Star and a Sunday newspaper known as The Sunday Star. It alleges that The Star also owns and operates radio station WDAF and television station WDAF-TV at Kansas City, Missouri. Sees is described as the director of advertising, treasurer and a director of The Kansas City Star Company. The indictment makes it clear that the geographical area in which the appellants are charged with monopolization and attempt to monopolize news and advertising in metropolitan Kansas City, Missouri, covered the Counties of Jackson and Clay in the State of Missouri and the Counties of Wyandotte and Johnson in the State of Kansas. In addition, it sets forth its definitions of the terms "classified advertising", "display advertising", "local display advertising" and "general advertising". It describes the nature of the trade and commerce of an interstate nature to which the indictment was applicable; that The Times and Star are delivered to 96% of all the homes in metropolitan Kansas City each day; that The Times' total net paid circulation exceeds 353,000 copies daily, The Star's total net paid circulation exceeds 361,000 copies daily; that The Sunday Star exceeds 378,000 copies each Sunday. It sets forth the formation and growth of The Kansas City Star, and the acts and practices upon which it is charged that there was an attempt to monopolize, as well as the acts and practices on the part of the appellants which it is charged resulted in monopolization.

From an examination of the indictment and the particularizations set forth therein, we are convinced that Rule 7 (c) of the Federal Rules of Criminal Procedure was satisfied in that the indictment does contain "* * * a plain, concise and definite written statement of the essential facts constituting the offense charged". We are of

the opinion that it charges offenses with sufficient clarity to enable the appellants to properly prepare their defense and with sufficient certainty and definiteness that trial thereon would be an effective bar to future prosecution for the same acts. *United States* v. *Cruikshank*, 1875, 92 U. S. 542, 566, 568; *Bennett* v. *United States*, 1913, 227 U. S. 333, 338; *Berger* v. *United States*, 1935, 295 U. S. 78, 82; *Hewitt* v. *United States*, 8 Cir., 1940, 110 F. 2d 1, 6, cert. den. 310 U. S. 641; *Claiborne* v. *United States*, 8 Cir., 1935, 77 F. 2d 682, 689. In prosecutions under the Sherman Act, it would seem particularly true that there has been no marked reliance upon rigorous common law standards. *E. g.*, *Nash* v. *United States*, 1913, 229 U. S. 373; *Knauer* v. *United States*, 8 Cir., 1916, 237 F. 8; *United States* v. *American Medical Association*, C. A. D. C., 1940, 110 F. 2d 703, 715, 716, aff'd 317 U. S. 519; *United States* v. *Armour & Co.*, 10 Cir., 1943, 137 F. 2d 269, 270.

We are satisfied that the indictment complies with the provisions of Rule 7 (c) and does not violate or deny the rights guaranteed by the Fifth and Sixth Amendments to the Constitution. There was no error in overruling appellant's motion.

All of the pre-trial motions hereafter discussed are addressed to the discretion of the trial judge. It is a fundamental rule of our appellate procedure that the trial judge will not be reversed after using his considered judgment on discretionary orders provided there has been no abuse of such discretion. With this rule in mind, we proceed to examine separately the pre-trial motions and the alleged erroneous orders issued as a result of those motions.

Subsequent to the court's denial of the motion to dismiss the indictment, appellants made a motion for a bill of particulars, the denial of which is cited as error. An

examination of the motion for a bill of particulars convinces us that it was aimed at obtaining in particular the details of the government's evidence. It is not the function of a bill of particulars to set forth evidentiary detail. Furthermore, the granting or denial of a motion for a bill of particulars is generally addressed to the sound discretion of the trial court. The rulings of the trial court thereon will not be disturbed excepting for clear abuse of that discretion. *American Tobacco Co. et al.* v. *United States*, 6 Cir., 1944, 147 F. 2d 93, 117, aff'd 328 U. S. 781 (an anti-trust case):

> "The granting or denying of demands for particulars is a matter within the discretion of the trial court and, unless there is an abuse thereof, its actions will not be disturbed."

In *Sawyer* v. *United States*, 8 Cir., 1937, 89 F. 2d 139, 141, this court said:

> "If the language of the indictment is so far definite and certain as to safeguard all of the rights of a defendant and to enable him properly to prepare his defense, a bill of particulars will not be required. *Bedell* v. *United States*, (C. C. A.) 78 F. 2d 358. The granting or the refusal of a motion for a bill of particulars is a matter that is governed by the sound judicial discretion of the trial court, and unless it shall be shown affirmatively that such discretion has been abused by the trial court a refusal to require a bill of particulars will not be disturbed by an appellate court."

There is no showing here that appellants were prejudiced by the court's denial of their demand. This is particularly true in light of the fact that appellants subsequently on August 13, 1954, filed a motion for discovery and inspection which the court granted by order on September 2, 1954, making available to the appellants all

documents covered by previous orders impounding such documents at the request of the grand jury. The case did not go to trial until January 17, 1955—apparently a sufficient length of time for the appellants to examine and become familiar with the documentary evidence relied upon by the government.

The appellants moved the court for an order fixing the time within which evidence would be admitted to a period of three years[1] prior to the return of the indictment and requested that evidence of events occurring prior thereto be excluded. In denying that motion, the trial court fixed January 1, 1936, as the cut-off date. Evidence of events occurring prior thereto was not to be admitted.

Intent was a vital element of the charges against the appellants. *Times-Picayune* v. *United States,* 1953, 345 U. S. 594, 626. Where that is true, "* * * it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment". *Wood* v. *United States,* 16 Peters 341, 358. In *United States* v. *Pullman Co. et al.,* 50 F. Supp. 123 (E. D. Pa., 1943), aff'd 330 U. S. 806, an anti-trust case, the court, in commenting on evidence prior to the indictment period, stated at page 126:

> "We think they are competent evidence to show defendants' state of mind at the time. The time, of course, was a good while ago, long before the Sherman Act. But if such declarations point in the direction of a path which has been followed continuously since their adoption, it is not unfair to take them as the initiation of a consistent Pullman policy. *Standard*

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[1] 18 U. S. C. A. §3282 provides for a three-year limitation to prosecutions such as here involved.

Oil Company of New Jersey v. *United States*, 1911, 221 U. S. 1, 46, 47, 75, 76, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A., N. S., 834, Ann. Cas. 1912D, 734; *United States* v. *Reading Company*, 1920, 253 U. S. 26, 43-45, 40 S. Ct. 425, 64 L. Ed. 760."

In order to show intent, it was entirely proper to receive evidence of a course of conduct engaged in by the appellants over a period of years leading up to the indictment period which might assist the jury in attempting to determine whether or not the appellants possessed that necessary intent during the time covered by the indictment. It would be illogical not to admit evidence as to a course of conduct over many years which manifested an intent to monopolize. But we need not use a rationale to explain this state of the law. The federal courts in antitrust cases have long admitted evidence of conduct prior to the statutory period. *Standard Oil Co.* v. *United States*, 1911, 221 U. S. 1, 75-76; *United States* v. *Pullman Co., supra; American Tobacco Co.* v. *United States*, 1944, 6 Cir., 147 F. 2d 93, aff'd 328 U. S. 781. The evidence here of prior conduct was admitted by the trial court and the jury instructed that:

> "* * * you may consider all evidence of acts which occurred prior to January 6, 1950, insofar as it may show a design or intent or pattern of conduct of the defendants with respect to their actions after January 7, 1950."

They were specifically told:

> "Under the law the defendants cannot be convicted for acts which occurred prior to the three years immediately preceding the date of indictment."

After the court's denial of appellants' motion to confine the evidence to the three-year period, the appellants objected to the 1936 cut-off date for evidence as being

arbitrary and without regard to their own relevant evidence. In fixing a cut-off date, the trial court's purpose was to eliminate remote evidence and keep the trial within reasonable bounds. Apparently the trial court felt that 1936 was the most practical date for such a cut-off. The trial court is given a wide range of discretion in exercising its right and duty to control the trial and keep it within reasonable time limits. *United States* v. *Socony-Vacuum Oil Co.*, 1940, 310 U. S. 150, 229-231. In considering the numerous witnesses and the mass of evidence, some conceivably going back as far as 1880, the founding date of The Star, the trial court was exercising its considered judgment in fixing the cut-off date. We see no justification in the record for disturbing the court's determination.

Complaint is made of the trial court's overruling of appellants' motion for a continuance filed on January 10, 1955. Such a motion is addressed to the sound discretion of the trial court. In the absence of a pure abuse of such discretion, the action of the trial court will be sustained. We find no such abuse here. We come to the same conclusion with reference to several motions for adjournment made during the trial.

Prior to trial, Sees filed a motion for severance which he claimed was improperly and erroneously denied. Separate trials are not necessarily a matter of right. See Rule 8(b) Federal Rules of Criminal Procedure, 18 U. S. C. A. In *Mellor* v. *United States*, 8 Cir., 1947, 160 F. 2d 757, cert. den. 331 U. S. 848, this court, speaking through Judge Woodrough, stated at page 761:

> "It is contended that it was improper to join two defendants in this single count indictment charging a substantive offense and not a conspiracy. However, the right to charge two defendants jointly in a single indictment is recognized in a number of well reasoned

cases, which hold that such procedure does not result in misjoinder of defendants, nor render the indictment subject to attack for duplicity."

In dealing with a similar contention, the Court of Appeals for the District of Columbia, in *Hall* v. *United States*, C. A. D. C., 1948, 168 F. 2d 161, 163, cert. den. 334 U. S. 853, stated:

> "Hall and Gray assert that their motions for severance were improperly denied. It is the general rule that persons jointly indicted should be tried together, and granting separate trials is a matter of discretion. The mere fact that admissions have been made by one which are not evidence as against the others is not a conclusive ground for ordering the parties to be tried separately. *Lucas* v. *United States*, 70 App. D. C. 92, 104 F. 2d 225."

Even where defendants have been separately indicted the ordering of a joint trial by the District Court may be sustained under the provisions of Rule 13 of the Federal Rules of Criminal Procedure, 18 U. S. C. A. In the case of *Malatkofski* v. *United States*, 1 Cir., 1950, 179 F. 2d 905, the Court of Appeals stated, at page 909:

> "Since the defendants were alleged 'to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses', they might, under Rule 8(b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A. have been joined as defendants in a single indictment. Under these circumstances the District Court was authorized by Rule 13 to order the indictments to be tried together. Each defendant moved for a separate trial on the general ground (no details being specified) that standing trial with the other defendant would be prejudicial. These motions for severance were denied. In this there was no error. The matter lay in the discretion of the trial judge, and no extraor-

> dinary facts appear from which it could be said that denial of the motions was an abuse of discretion. See *Stilson* v. *United States*, 1919, 250 U. S. 583, 40 S. Ct. 28, 63 L. Ed. 1154. Throughout the trial, whenever evidence was introduced which was competent against one defendant and incompetent against the other, the judge duly admonished the jury that the evidence was received only as against the one defendant and must be disregarded by them in their consideration of the case of the other defendant. See *United States* v. *Ball*, 1896, 163 U. S. 662, 672, 16 S. Ct. 1192, 41 L. Ed. 300."

The Supreme Court has lent finality to the rule of discretion on the part of the trial court in determining a motion for severance in the recent case of *Opper* v. *United States*, 1954, 348 U. S. 84, 95:

> "It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled. The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial."

See also Note and cases cited in 70 A. L. R. 1172.

In this case, the court repeatedly throughout the trial admonished the jury that certain evidence received was

not applicable to Sees and carefully charged the jury that Sees could be held responsible only for acts performed by him or under his direction. The fact that the jury returned a verdict of not guilty on the second count as to Sees but nevertheless found The Star guilty shows they gave individual treatment to each and lends impetus to the statement that "our theory of trial relies upon the ability of a jury to follow instructions". The refusal of the trial court to grant Sees' motion for severance was a valid exercise of discretion and in the absence of a showing that such discretion was abused is not reversible here. No error was committed in denying Sees' motion for severance.

Evidence, Trial Rulings and Instructions.

The Kansas City Star was founded in 1880. Among its competitors at that time were the Kansas City Journal, founded in 1854, and The Kansas City Times, founded in 1867. In 1894 The Sunday Star was established. In 1901 the owner of The Kansas City Star acquired The Times and thereafter published The Kansas City Times (morning), The Kansas City Star (evening) and The Sunday Star. In 1905 the Kansas City Post was established. The Journal and the Post were merged in 1922. The Kansas City Star Company (the present appellant) was incorporated in 1926, at which time it commenced operation of radio station WDAF, later owning and operating television station WDAF-TV. In 1928 the morning Journal discontinued publication. The Sunday Journal discontinued in 1941 and the evening Journal discontinued in March, 1942.

The metropolitan Kansas City area in which the appellants were charged with attempting to monopolize and monopolization of interstate trade and commerce in the

dissemination of news and advertising is made up of four counties: Jackson and Clay in the State of Missouri and Wyandotte and Johnson in the State of Kansas. Within this area there are located four major urban communities: Kansas City, Missouri; Kansas City, Kansas; North Kansas City, Missouri; and Independence, Missouri. This metropolitan area contains a population of approximately 854,000 persons. During the indictment years The Star advertised and the evidence justified the conclusion that it possessed 95% coverage of all households in the four counties referred to. In 1952, one of the indictment years, there were seven daily newspapers published in the four-county area in addition to those published by The Star. These daily newspapers were The Kansas City Kansan, The Independence Examiner, The Excelsior Springs Standard, The Independence Daily News, The Daily Record, The Kansas City News-Press, and The Daily Drovers Telegram.* The Star's dominance in the area is evidenced by circulation figures.

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*A trade journal limited to livestock reports.

	"1951[1] Average Daily Circulation	Per Cent of Total	1952[1] Average Daily Circulation	Per Cent of Total
1. Kansas City Star Company				
Kansas City Times (M)	351,126[2]	46.58	350,206[2]	46.74
Kansas City Star (E)	360,143[2]	47.78	358,231[2]	47.81
Total Times and Star	711,269[2]	94.36	708,437[2]	94.56
2. Kansas City Kansan (E)	29,084[2]	3.86	27,873[2]	3.69
3. Independence Examiner (E)	7,754[3]	1.03	7,862[3]	1.05
4. Excelsior Springs Standard (E*)	3,189[3]	.42	3,283[3]	.44
5. Independence Daily News (E ex. Sat.)	1,448[3]	.19	550[3]	.07
6. Daily Record (D)	1,015[3]	.14	1,004[3]	.13
7. Daily News Press (D)	Not published		445**[3]	.06
Total Kansas City	753,759	100.00	749,454	100.00

[1]Figures refer to twelve-month period ended September 30 of each year.

[2]Source: Audit Bureau of Circulations, Audit Reports.

[3]Source: Statement of ownership, management and circulation required by Act of Congress of August 24, 1912 (Title 39, U. S. Code, Sec. 233).

*Tuesday, Wednesday, Thursday and Friday.

**Three months preceding October 1, 1952.

M—Morning.

E—Evening.

D—Daily".

Evidence reflecting the advertising revenue of daily newspapers in the Kansas City area for 1951 and 1952 discloses that in 1951 the appellant Star received a net advertising revenue of $17,774,581.17 or 94.11% of the total. The Kansas City Kansan received $716,556.79 or 3.79% of the total. The other newspapers received lesser percentages. In 1952, the appellant Star received a net advertising revenue of $18,655,629.64 or 94.08% of the total. The Kansas City Kansan received $739,509.36 or 3.73% of the total. Other daily newspapers received

smaller percentages. A tabulation of advertising revenue from daily newspapers, radio and television stations located in the area for the years 1951 and 1952 indicates that the appellant Star in 1951 received $19,938,484.68, or 84.24% of the total. Its nearest competitor, The Kansas City Kansan, received in 1951 a total of $1,022,003.71, or 4.32% of the total, with other competitors having smaller percentages. In 1952, The Star received of such advertising revenue $21,350,721.97, or 85.40% of the total. Its nearest competitor, The Kansas City Kansan, received $1,044,302.75, or 4.18% of the total, with other competitors having lesser percentages.

The Star's "dominant" position as to both circulation and advertising in the daily newspaper field in metropolitan Kansas City becomes apparent.

The government sought to show that The Star's dominant position gave it the power to exclude competition and that it, through appellant Sees and others, exercised such power for the purpose and with the intent of excluding competition. Evidence tended to show and the jury was justified in concluding that The Star was an indispensable advertising medium for many advertisers and that it threatened advertisers with refusal to take their ads if they advertised in competitive publications. As an example, the manager of three theaters in Kansas City, Missouri, was told that his ad should be taken out of the Journal-Post and that if he didn't do so, his advertising would be left out of The Kansas City Star and Times. The manager of a store in Kansas City who had been advertising in the Journal-Post and who wanted to get his ads back into The Star was given to understand that it would be on an exclusive basis only. The then advertising manager of The Star instructed a Star solicitor to see one of The Star's regular advertisers who was also using the

Journal-Post, "* * * to go over there and either get him out of the Journal or get him out of The Star". Appellant Sees instructed solicitors to get advertisers out of the Journal-Post. The local advertising manager for Sears, Roebuck was told by a Star solicitor that The Star did not like to see ads running in the News Press and stated, "If you don't desist, you will either injure your position in the Kansas City Star or if we have additional newsprint to allocate you may not get your share." Appellant Sees, speaking in behalf of the appellant Star, told an advertiser, "That is all right, you can go ahead and advertise in that medium if you want to, but if you have other mediums to advertise in, then you don't need the Kansas City Star." During the newsprint shortage of 1946-1947 an advertiser who planned on using other advertising publications was told by a Star solicitor that if he continued to use other media "the chances were that the space in the Star would no longer be available * * *". These are but some of the instances shown in the record of the use of threats and coercion on the part of The Star and Sees to destroy competition.

Other evidence is disclosed in the record whereby the jury could have concluded that advertisers were threatened with loss of desirable position in The Star papers if they placed ads in competitive publications. The evidence indicated The Star extended its discipline to potential competitors. When several Kansas City merchants had made short term contracts with Prom, a new monthly magazine for children of school age, Star solicitors informed them as to the merits of terminating their use of Prom. As the merchants began to receive poor positions in The Star, they got the hint and at least two withdrew the Prom advertisements.

The course of conduct of The Star and Sees continued on through the preliminary period subsequent to 1936 into the indictment years extending from January 7, 1950, through January 6, 1953. A store manager testified that in 1952 and prior years he would receive from The Star clippings of ads he had placed in other media. A solicitor told him that his other ads were looked upon unfavorably and that if he wished a more favorable position in The Star it would be better if he confined his advertising only to The Star. As a result, the manager discontinued his use of a rival paper, the News Press. A dance studio manager testified that in 1952 he found the studio's ad missing from the usual position in The Sunday Star. One of the studio owners said that she had spent considerable time in search for it and then complained to The Star. In explanation of the change of position, a solicitor told her, "Well, I assumed that you didn't appreciate the place which you have been getting because I notice you have an ad in the News Press." The ad was withdrawn from the News Press and the following week the studio ad reappeared in the customary position in The Sunday Star. A patron of 18 years discovered in July of 1952 that his ad was much further back than usual. The reason, as Sees explained while pointing to a rival paper was "Do you have to advertise, do you have to run such a large size ad in that particular paper?"

It may well have been, as The Star suggests, that innocent motives dictated the placing of ads in one position or another but the jury decided, as was their prerogative, that the motive was otherwise.

Evidence in the record would have justified the jury in finding that with some advertisers The Star threatened to discontinue their ads unless The Star was given "equal space" with competitive publications, regardless of how

limited their circulation and the fact that "equal space" in a large publication such as The Star would cost a great deal more than the same space in one of its small competitors. The record further justifies the conclusion that some advertisers were threatened with having their credit cut off where they also used competitive publications for advertising.

An example of the use of the dissemination of news to control advertising is illustrated in the instance of a big league baseball player who was a partner in a florist's shop in Kansas City. The florist shop also advertised in the Journal-Post. A Star solicitor informed one of the partners that The Star would discontinue publicizing the baseball player if the florist shop continued using the Journal-Post for advertising, Sees instructing a Star solicitor to tell them, "* * * to get out of the Journal-Post or he wouldn't get any sports, that he wouldn't get any cooperation from the sports desk on anything that he did in organized baseball." Sees instructed the solicitor, "* * * Sees told me that if, that if I didn't get the ad in the Post to go out and tell Gleeson that if he knocked 100 home runs in the year his name would never appear in the paper outside of the box score and it got so hot to me that I told Gleeson to come down to The Star to get me off the hook with Mr. Sees," and the solicitor for The Star then told the advertiser, "I told him that they wanted him out of the Post and that if he didn't get out of the Post that he wouldn't get much sport write-up from the sport desks."

The record discloses instances of the appellants using the dominant position of The Star to dictate to advertisers how much of their advertising quota would have to be spent with The Star. An instance in 1950 is illustrative: The representative of an advertising agency

which had charge of advertising a forthcoming auto show talked with appellant Sees and was told, "Well, we can make or break your show," and was told what portion of their budget was to be spent in The Star papers. Sometimes the threat to close an account was enough to curtail use of other media. In 1951, a cloth supplier to The Star who placed ads in The Star also placed another ad in the News Press. A Star solicitor subtly suggested that it was not "right" to run an ad elsewhere than in The Star. To this the firm agreed. The ad in the News Press was promptly and permanently withdrawn because they "appreciated the business * * * from The Star."

From 1949 to the date of the return of the indictment The Star owned WDAF-TV, the only television station in the metropolitan Kansas City area. In addition, it owned radio station WDAF. The evidence in the record would justify the jury in concluding that The Star used its dominant position to aid in its newspaper advertising, making it clear in some instances that advertisers could not buy time on WDAF-TV unless they also advertised in The Star papers. For example, in 1952 The Star refused time on WDAF-TV to a furniture company. A Star solicitor called attention to the fact that the company did not use The Star columns. When the solicitor was told that they had no need for newspaper advertising, he then in effect told them that if that were the case the company had no need for television and refused the request for time.

Another instance of using television as a weapon to exclude competition was related by a part owner of Television Preview magazine. In 1952, one Dean Fitzer, general manager of WDAF-TV and a director of The Star, told the part owner, in response to a request for television time, "We won't tell you that we can't sell you time, but

just don't ask me for it, because I won't have any." And if this was not quite clear enough, he added, "I don't want to see this magazine on television." The Star having the only television outlet available in the area, Television Preview was unable to advertise in the most logical medium—television.

These and other instances indicate that the television and radio facilities of The Star were being used more as appendages to the successful operation of The Star than they were being used as independent entities.

It was The Star's practice to sell its daily newspapers to its subscribers in combination only. Subscribers were required to subscribe to the morning Times and the evening Star in combination with The Sunday Star for a total of thirteen papers per week for a single price (all papers could be individually purchased at newstands). This joint subscription was an invariable policy and insisted upon under any circumstances.

With reference to classified advertisers and general advertisers, The Star required that they run their advertisements in both the morning Times and the evening Star, regardless of the desire of the advertisers to use only one of the papers. The evidence indicated that The Star used its dominant position to force advertisers to advertise in both the morning Times and the evening Star regardless of their wishes and regardless of the fact that some of them felt that because of their particular type of business either the morning issue of The Times or the evening issue of The Star was the only advertising vehicle from which they derived benefit. It was the government's claim that such forced combination of The Times and Star advertising had the effect of foreclosing competition in that advertisers who had of necessity to depend upon

either The Times or The Star and were forced to use both could not advertise in competing publications because of their unnecessary expenditures in the forced combination.

The Star contends that it publishes but one newspaper of thirteen issues per week; that these issues are sold in combination in order that the reader may obtain a complete round-the-clock news report, thus enabling The Star's readers to get news more frequently than is possible in a 24-hour newspaper. The morning paper is designated "The Kansas City Times" but nevertheless carries in parentheses over its name "The Morning Kansas City Star".

It was the position of the government that the morning Times and the evening Star constituted two separate and distinct newspapers owned by The Star and that it was the intention of The Star to exclude competition by means of a forced combination subscription policy and unit advertising rate; that it maintained the subscription rate at an arbitrarily and unreasonably low level during the period when the most serious competition existed, that is, while the Journal-Post was still being published, and that in April, 1942, a month after the Journal-Post ceased publication The Star raised its subscription rates. The government points out that from 1938 to 1941 The Star's total revenue remained relatively constant, whereas starting with the demise of the Journal-Post and the increase in subscription rates immediately thereafter The Star's revenue went from $7,924,516.66 in 1941 to $10,231,883.47 in 1943, while its operation expenses declined from $6,530,757.24 to $6,497,837.31 during the same period.

It is The Star's claim that its survival and present position of dominance were entirely the result of superior

skill, foresight and industry; that its continuous growth and expansion were the result of efficient management and public acceptance; that its thirteen issues per week were published in such a manner as to fully and efficiently utilize its plant equipment and personnel; that its advertising and subscription rate structures were to enable it to increase its efficiency and to better serve its customers, both advertisers and subscribers. It asserts that its unit advertising rates are legal and that the court erred in charging that the use thereof could constitute a monopolization.

In the first place, appellants' contention is prefaced with the assumption that The Star published but one newspaper of thirteen issues per week and not two newspapers, the morning Times and the evening Star, as contended by the government. On this point, the trial court commented to the jury:

> "The papers apparently are distinct in appearance, except that the morning paper carries the parenthetical heading stated aforesaid, that it is the morning edition of the Kansas City Star and it carried entirely different news, different syndicated columns, different comics,"

but stated:

> "* * * you must consider whether The Kansas City Times and The Kansas City Star are separate and distinct newspapers, for obviously the forced combination could operate only between two newspapers and not between editions of the same paper."

We think a question of fact was raised and that it was properly left for the determination of the jury. In contending that the unit advertising plan was legal, appellants place substantial reliance upon *Times-Picayune Pub-*

lishing Co. et al. v. *United States, supra,* 1953, 345 U. S. 594, wherein the United States Supreme Court reversed the trial court and held that the unit advertising rate therein involved was not a violation of the Sherman Anti-Trust Act. The *Times-Picayune* case was, in the last analysis, determined on the basis of a failure of proof. Tying arrangements in advertising may be in violation of the Sherman Act, but the Supreme Court found in the *Times-Picayune* case that the record there did not justify that conclusion. The Supreme Court has said that tying or unit arrangements are not of themselves unlawful, but also makes it manifest that neither are they of themselves lawful. As with most cases, tying arrangements must be judged amidst the circumstances and surroundings in which they operate. The Supreme Court thus concludes, 345 U. S. 594, 627:

> "* * * this record does not establish the charged violations of § 1 and § 2 of the Sherman Act. We do not determine that unit advertising arrangements are lawful in other circumstances or in other proceedings. *Our decision adjudicates solely that this record cannot substantiate the Government's view of this case.*" (Emphasis supplied.)

Unlike *Times-Picayune,* but comparable to the situation presented in the *Lorain Journal Co. et al.* v. *United States, supra,* 1951, 342 U. S. 143, we think the record here could justify the jurors' conclusion that the morning Times and evening Star were two separate newspapers with distinct and separate uses for advertisers; that each was dominant in its own field; that together they dominated the market both morning and evening; and that the unit advertising method was used, notwithstanding the protests of advertisers, with the intent and effect of excluding competition. As to the forced combination rate, we think

the jurors could properly conclude that the effect upon the average subscriber who must take thirteen papers a week is to foreclose the likelihood he will purchase other competing papers. The result on circulation of smaller papers in the area is self-evident. We find no error in the court's submission of these issues to the jury.

The Star argues that the court prejudicially erred in overruling its motion for judgment of acquittal for the reason that the evidence was insufficient as a matter of law to establish that it possessed a monopoly of the dissemination of news and advertising in Kansas City and in the surrounding territory. The Star claims that it did not have a monopoly of the dissemination of news and advertising and that effective competition existed in the dissemination of each. Size in itself does not create an unlawful monopoly within the meaning of the Sherman Anti-Trust Act, nor does that Act place a premium upon successful business operation. "The purpose of the Sherman Anti-Trust Act is the preservation of a system of free competitive economic enterprise and the protection of the public against the evils incident to monopolies * * * tending directly toward unreasonable suppression or restraints of interstate trade or commerce." 58 C. J. S. Monopolies §17, p. 972. The Act aims to secure equality of opportunity and the protection of the public against the evils incident to monopolistic practices. If The Star here enjoyed a substantial monopoly in the dissemination of news and advertising, and used power therefrom to effectively harm or destroy free competition and did so with the intent to achieve that end, the statute has been violated. There need be no showing of absolutism. If the dominance of The Star in the news and advertising fields gave it the power to thereby effectively destroy competition and it acted with that intent, then monopoliza-

tion within the meaning of the Sherman Anti-Trust Act has been established. As pointed out by Judge Learned Hand in *United States* v. *Associated Press et al.*, D. C. S. D. N. Y. 1943, 52 F. Supp. 362, 371, and quoted approvingly by the Supreme Court in affirming that decision, *Associated Press et al.* v. *United States, supra*, 1945, 326 U. S. 1, 17:

> "* * * monopoly is a relative word. If one means by it the possession of something absolutely necessary to the conduct of an activity, there are few except the exclusive possession of some natural resource without which the activity is impossible. Most monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; *his monopoly is measured by the handicap he can impose.*" (Emphasis supplied.)

The Star claims that it is in direct and vigorous competition with other mass media engaged in the dissemination of news and advertising and that it could not exclude them from the market or control their prices.

The indictment makes it clear that the appellants were charged with attempting to monopolize and monopolizing the dissemination of news and advertising in newspapers and on radio and television broadcasting stations in the four-county area referred to. In other words, the appellants were charged with attempting to monopolize and monopolizing trade in the media in which they did business. The Star refers to the other daily newspapers in the area and to the fact that in 1952 there were 78 weekly newspapers and suburban papers published in the four-county area which it claims disseminated news and advertising in competition with the appellant. The Star also claims that it received competition from radio and television stations, magazines, both monthly and weekly,

newsreels, topical books, etc., from which it argues that the evidence was wholly insufficient to sustain the verdict that it had monopolized in the dissemination of news and advertising. What was The Star's market control and who were its competitors? In searching for the answer to that question the appellants rely strongly on the case of *United States* v. *E. I. du Pont de Nemours & Co.*, 1956, 351 U. S. 377. In that case it was shown that du Pont produced approximately 75% of the cellophane sold in the United States, but that cellophane constituted less than 20% of all flexible packaging materials sold in the United States. The trial court found that the relevant market for determining the extent of du Pont's market control was the market for flexible packaging materials and that competition from other materials in that market prevented du Pont from possessing monopoly powers in its sales of cellophane. The Supreme Court sustained. In so doing, it stated at page 394:

> "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power. Because most products have possible substitutes, we cannot, as we said in *Times-Picayune Co.* v. *United States*, 345 U. S. 594, 612, give 'that infinite range' to the definition of substitutes. * * *
>
> But where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. * * * (page 395) *In considering what is the relevant market* for determining the control of price and competition, *no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal.*" (Emphasis supplied.)

In this case we do not think that radio stations and television stations located outside the metropolitan area herein described, magazines, newsreels, topical books, specialty publications, etc., are "market alternatives" or effective substitutes such as was meant by the Supreme Court in the *du Pont* case. In that case, the Supreme Court also made clear that the market which must be examined to determine the existence of monopoly power will vary with the part of commerce under study. The considerations that go to determine The Star's relevant market must be with due regard to the realities of newspaper advertising. That is what is meant when the Supreme Court speaks about narrowing the infinite range that market substitutes could encompass. *Times-Picayune* v. *United States, supra,* at page 612. In footnote 31, at page 612 of the *Times-Picayune* case, the Supreme Court makes specific reference to the kind of market with which we are here concerned:

> "The advertising industry and its customers, for example, markedly differentiate between advertising in newspapers and in other mass media. See, *e. g.*, Frey, Advertising (2d ed. 1953), cc. 12, 15; Duffy, Advertising Media and Markets (2d ed. 1951), cc. 3, 4; Hepner, Effective Advertising, c. 20 (1949); Borden, Taylor and Hovde, National Advertising in Newspapers, *passim* (1946); Sandage, Advertising Theory and Practice (3d ed. 1948), cc. XX, XXI."

The other media mentioned by appellants were not competitors in the real sense of the word and this is true in both advertising and news. Magazines are not effective alternatives for the daily newspapers and certainly the grocer who desires to advertise a specialty in some of his items and has only The Star publications for daily use would hardly find a monthly or weekly magazine an effective substitute. In view of the dominant position The

Star enjoyed in the field of advertising and news, the court's instructions on this point were nevertheless eminently fair. The court instructed the jurors that they could take into consideration the existence of a wide range of competing media to determine if The Star was in a monopolistic position, (although the relevant market was restricted to metropolitan Kansas City throughout the trial). While the court commented that weekly and neighborhood newspapers could scarcely be considered sizeable competitors, it nonetheless ended these expressions of opinion by cautioning the jurors that such statements did not imply guilt or innocence, and that the jurors would be the final judges as to what was or was not competition. From these instructions, it is quite clear that the jurors could have considered as sizeable competitors those which the court thought were not, and that other media, with a small field of circulation compared to that of The Star, were actually a bar to monopoly.

As to The Star's claim that its position was legally acquired and was the result of superior skill, foresight and industry, we have already stated that size alone does not spell out an unlawful monopoly within the meaning of the Sherman Act. See *United States* v. *International Harvester Co.*, 1927, 274 U. S. 693, 708. It has, however, been noted that size often affords an opportunity for abuse. *United States* v. *Swift & Co.*, 1932, 286 U. S. 106, 116. There are instances innumerable where skill, foresight and industry as well as happenstance created dominance and no charge of an illegal monopoly could be predicated thereon. If the evidence here disclosed nothing more than that The Star held a position of dominance as the result of the undoubted ability, ingenuity, intelligence and industry of those who directed its activities, this case should fall. It is with the power created by that monop-

olistic or dominant position, the exercise of that power and the intent with which it is exercised to destroy competition with which we are here concerned. Whether there existed monopolistic power, the intent to destroy competition and the exercise of the power so to do were questions of fact for the jurors, whose province and prerogative to so determine are too often lost sight of in prosecutions of appeals from their judgments. In the last analysis, it was for the jurors to say whether The Star possessed an unlawful monopoly and whether it exercised monopolistic power with the intent and for the purpose of destroying competition. The role of the trial judge was to see that all competent evidence that was offered came before the jury, that incompetent evidence was excluded, and that the jurors were fully instructed on the applicable law. The role that this as an appellate court has is to determine whether the trial judge committed prejudicial error in his rulings or charge and whether there was substantial evidence from which the jury might have concluded that the appellants were guilty.

In considering the question of whether or not there is substantial evidence in the record to sustain the verdicts of guilty, we bear in mind that it is not for us to weigh the evidence nor to judge the credibility of the witnesses. If there is substantial evidence in the record viewed in the light most favorable to the government, the verdicts of the jury must be sustained. *Glasser* v. *United States*, 1942, 315 U. S. 60, 80. In *Myres* v. *United States*, 8 Cir., 1949, 174 F. 2d 329, 332, cert. den. 338 U. S. 849, this court said:

> "In determining the sufficiency of the evidence to support the verdict of the jury, this Court must take that view of the evidence which is most favorable to the government, and give to the government the ben-

efit of all inferences which reasonably may be drawn in its favor. *Affronti* v. *United States*, 8 Cir., 145 F. 2d 3, 5, and cases cited."

From an examination of the voluminous record, which by leave of court was printed in its entirety and submitted here, we think it perfectly clear that The Star's position in metropolitan Kansas City was of such dominance in the field in which it did business during the indictment years that it could be found by the jury that it possessed monopoly power, that it was an indispensable medium of advertising for some advertisers (See *Lorain Journal et al.* v. *United States*, *supra*, 1951, 342 U. S. 143, 152), that its position gave it the power to exclude competition, and that it exercised such power for the purpose and with the intent so to do, within the meaning of the Sherman Anti-Trust Act. The Star's motion for judgment of acquittal was properly denied.

It is strenuously urged on this appeal by The Star that it was not responsible for the bankruptcy and suspension of the Journal-Post and that the trial court prejudicially erred in excluding evidence offered by The Star as to the operation of the Journal-Post and the economic and other causes for the Journal-Post's suspension and bankruptcy. The Journal-Post suspended publication during the preliminary period prior to the indictment years. The government introduced evidence with respect to appellant's coercion of advertisers who used the Journal-Post. The purpose of this evidence was to show intent and a course of conduct engaged in by The Star and by Sees that continued into the indictment period. We think the trial court was correct in excluding the proffered testimony. The reason for the failure of the Journal-Post was not an issue in this case. That failure may have been due to mismanagement, lack of skill and industry or a variety

of other reasons, but whatever they were, they would not excuse the appellants' actions if such actions were a violation of the law. If The Star here was guilty of attempting to monopolize and monopolizing and Sees was guilty of attempting to monopolize, then the acts of the Journal-Post and the reasons for its demise are not a defense. To have allowed the offered testimony would have set the jurors off on a determination of an issue foreign to the real problems before them. On the other hand, the actions of the two appellants in dealing with the advertisers in the Journal-Post were competent to show intent and course of conduct. This case was not concerned with the activities of the Journal-Post but with those of the appellants and with the preservation of free competitive enterprise and whether or not there was unlawful exercise of monopoly power.

The Star also contends that the trial court erred in allowing evidence to go to the jury concerning The Star's purchase of the assets of the Journal-Post, consisting of presses, names and its newspaper morgue or library. We think the assertion is without merit and that the jurors, under the instructions of the trial court, had the right to consider whether or not the purchase of such assets (some of which were indispensable to anyone contemplating the starting of a newspaper in that area) indicated intent, design or course of conduct on the part of The Star. We find no error in allowing the evidence to go to the jury.

As already indicated, the evidence as to Sees' attempts to monopolize in the dissemination of advertising is substantial. Sees lays particular stress on the fact that the evidence indicates and the court charged:

> "The evidence shows that the extent of his (Sees') activities was confined to the Advertising Department and the dissemination of advertising."

In the indictment he was charged in Count 1 with attempting to monopolize the dissemination of news *and* advertising, and he argues therefore that the government has failed to prove every element of the offense charged against him. Sees was director of advertising, treasurer and a member of the board of directors of The Kansas City Star Company. Advertising revenues for which he was responsible made up a vast percentage of the total income of The Star, thus supporting its news dissemination. In 1952 its revenues from advertising alone in daily newspapers, radio and television totalled $22,152,291.68,[2] with revenue from both advertising and circulation for the same year totalling $25,963,271.86.[2] Reliance in the dissemination of news upon advertising revenue is apparent. In fact, each was dependent upon the other and each without the other would fall. But aside from this, the fact that Sees meddled or attempted to meddle in the news department is borne out by the record. His threat to see that a certain baseball player's name never again appeared on the sport sheets of The Star unless certain advertising was taken out of a competitor's publication, this occurring during the preliminary period, is evidence of Sees' intent and design. The fact that that intent and design were carried over into the indictment period is justified by his threat to make or break a certain show unless a named amount was spent for advertising with The Star.

Aside from such direct instances, monopolistic control of advertising strikes at the very heart of a competitor's dissemination of news. The Supreme Court, in the *Lorain Journal* case *supra*, 342 U. S. at 149, gave approval to the lower court's statement in *United States* v. *Lorain Journal*

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[2]Including $801,569.71 income from weekly Star Farmer not included in former figures.

Co. et al., E. D. Ohio 1950, 92 F. Supp. 794, 798, 799, as follows:

> "Having the plan and desire to injure the radio station, no more effective and more direct device to impede the operations and to restrain the commerce of WEOL could be found by the Journal than to cut off its bloodstream of existence—the advertising revenues which control its life or demise.
>
> * * * * * * * *
>
> * * * the very existence of WEOL is imperiled by this attack upon one of its principal sources of business and income."

In the last analysis, Sees' claim of innocence with reference to attempting to monopolize the dissemination of news is not sustained. If Sees, as the advertising director and chief person responsible for the advertising methods of The Star, so handled and manipulated the advertising as to destroy competition from the disseminators of news, it can hardly be said that he was not attempting to monopolize the dissemination of news. The effect of his advertising methods was to destroy news publications for whom advertising was their life blood.

We think this interdependence of news and advertising plus Sees' position, in addition to the instances referred to, justified the jury's verdict against him under Count 1. Denial of Sees' motion for judgment of acquittal was not error.

Complaint is made that the court's instructions to the jury misdefined the offenses of monopolization and attempting to monopolize as charged in the indictment. The jurors were told that if The Star occupied a monopoly position and that within the statutory period it committed the acts charged in the indictment with the intent to maintain its monopoly or to eliminate competition, then The

Star was guilty of monopolization. They were instructed that monopolization "* * * means the possession of monopoly power by a party or parties through which power it is possible to exclude actual or potential competitors from any part of the trade or commerce among the several states, provided that he or they have the intent or purpose to exercise that power." In considering the charge as a whole, we find no fault with the court's definition.

As to the claim that the court erred in defining the offense of attempting to monopolize, Sees asserts that the essential elements of an attempt to monopolize are a specific intent to monopolize coupled with overt acts which, though not successfully monopolizing, approach so near as to create a *dangerous probability* of successful monopolization. Reliance is had on *American Tobacco Co. et al. v. United States*, 1946, 328 U. S. 781, 785, wherein the Supreme Court approved the trial court's definitions of the term "monopolize" and the phrase "attempt to monopolize". The approved instruction there as to "attempt to monopolize" was as follows, page 785:

> "The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, * * *."

In the instant case, the trial court told the jury that an attempt to monopolize "* * * means the employment of methods and practices which are utilized for the specific purpose and with the specific intent to achieve or build a monopoly, and which, if successful, would be likely to accomplish such monopolization." In place of "dangerous probability" the trial court used the words "would be likely to accomplish". We do not think that the court's

charge here placed a lesser burden on the government than that contained in the definition approved by the Supreme Court in the *American Tobacco Co.* case. The phrase "dangerous probability" carries with it no substantially different meaning to the average person than the phrase "likely to accomplish". Trial courts are not bound to use the specific language contained in requested instructions or in instructions approved by appellate courts, but may use their own language so long as it conveys to the jurors proper understanding and meaning. Attempts to commit crime have been defined by many courts in many ways. An attempt to monopolize has been defined as an attempt to gain control of an industry by means which prevent other men from engaging in fair competition. *United States* v. *Whiting*, 1914, 212 F. 466, 478; *United States* v. *Klearflax Linen Looms, Inc.*, 1945, D. C. Minn., 63 F. Supp. 32, 41. Here the trial court's requirement of a finding of "specific intent" plus likelihood of accomplishment is certainly tantamount to the "dangerous probability" in the definition relied on by Sees. In the *American Tobacco Co.* case, the Supreme Court was merely approving the trial court's definition but was not saying that that exact language had to be used in all such instructions. In the *American Tobacco Co.* case, containing the definition relied on by Sees, the Supreme Court specifically stated at page 811:

> "The authorities support the view that the material consideration in determining whether a monoply exists is not that prices are raised and that competition actually is excluded *but that power exists to raise prices or to exclude competition when it is desired to do so.*" (Emphasis supplied.)

Where the charge is that of monopolization, it is necessary only to establish the existence of and intent to monop-

olize coupled with monopoly power. In *United States* v. *Griffith*, 1948, 334 U. S. 100, the Supreme Court stated at page 106:

> *"Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised.* For § 2 of the Act is aimed, *inter alia*, at the acquisition or retention of effective market control. See *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 428, 429. Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809, 811, 814. It is indeed 'unreasonable, *per se*, to foreclose competitors from any substantial market'. *International Salt Co.* v. *United States*, 332 U. S. 392, 396. The anti-trust laws are as much violated by the prevention of competition as by its destruction. *United States* v. *Aluminum Co. of America, supra.* It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor is unlawful." (Emphasis supplied.)

See also *Schine Chain Theatres, Inc. et al.* v. *United States*, 1948, 334 U. S. 110, 130; *United States* v. *Paramount Pictures, Inc., et al.*, 1948, 334 U. S. 131, 174; *United States* v. *United Shoe Machinery Corp.*, 1953, 110 F. Supp. 295, aff'd 347 U. S. 521.

Appellants claim that the *Griffith* case and other cases relied on by the government do not support the government's contention here in that those cases are conspiracy cases. That is but to argue that the cases cited place an

individual monopolist in a much more favorable position than several who act together in a conspiracy. If the essential elements of the offense of monopoly are present, the law applies, whether the prosecution is against one or several acting in concert. We think that is made clear by the Supreme Court's language in the *Griffith* case. Therein the Supreme Court specifically points out that Section 2 of the Sherman Act is not restricted to conspiracies but *makes it a crime for any person to monopolize or attempt to monopolize*, and in the next sentence states, at page 107:

> "* * * monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised."

But be that as it may, the trial court here went farther and required the jury, before a verdict of guilty could be returned, to find three elements: 1, Existence of monopoly power; 2, intent to monopolize; 3, performance of the acts charged in the indictment within the three-year period. We think the charge was eminently fair to both appellants.

It is claimed that the trial court made prejudicial comments in his charge to the jury. We find no justification for that assertion. A federal judge has a right to fairly comment upon the evidence and even to express his opinion thereon, provided he makes clear that the ultimate fact determinations are for the jurors. *Quercia* v. *United States*, 1933, 289 U. S. 466, 469. In *Buchanan* v. *United States*, 8 Cir., 1926, 15 F. 2d 496, 498, this court clearly set out the limitations on judicial comment in jury instructions:

> "Under the rule, as stated and applied by the Supreme Court, it seems that, when a judge expresses

his opinion as to the facts to the jury, making it clear that it is nothing but his opinion, and not binding upon them in any way, and that it is their duty and responsibility to determine all of the facts, he is within his rights, and that he is only subject to reversal when his comments upon the evidence or opinion as to the facts amount to partisan argument or advocacy, or constitute an appeal to passion or prejudice."

We believe that the charge here, examined in its entirety, which is as it should be, fairly and fully apprised the jury of the applicable law and that the trial court's comments on the evidence were sufficiently guarded to come within the limitations referred to. The jurors were told that they were supreme in determining the facts and that their determinations were binding upon the court. As if to doubly impress them with the idea that their responsibility was to be exercised without restraint and to make the point clear beyond cavil, the court explained further:

"In the Federal Courts, as distinguished from the State Courts, in charging the jury as to the law, the Court has the right to express an opinion with respect to or comment upon the evidence. It is the duty of the Court to charge the jury as to the law and the Court may advise the jury as to the facts. There may be instances during this charge when the Court may make some comment upon the evidence, or express some opinion in regard to it, or you may infer from the Court's language that the Court may have some view relating to the evidence, but I have stated to you heretofore that you are the finders of the facts; you are the sole judges of the credibility of the witnesses and of the weight and value you will place upon their testimony, and I charge and admonish you that if there is any expression of opinion or comment upon the evidence by the Court, it is not binding upon you in a determination of such facts. It is

simply the expression of the Judge, and it is not meant to invade your province as the finders of the facts."

We find no error in the court's comments.

Conclusion.

Finally, it is contended that this prosecution endangers the freedom of the press guaranteed by the First Amendment, and that "* * * A newspaper is intimidated if it is subject at any moment to prosecution under the Sherman Act whenever it opposes or antagonizes those public officials in power". The suggestion that freedom of the press requires immunity from law to which the general public is not exempt is not new. The Supreme Court, in *Associated Press* v. *N. L. R. B.*, 301 U. S. 103, 132-133, said:

> "The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. *He is subject to the anti-trust laws*" (Citing *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co. et al.*, 1934, 293 U. S. 268.) (Emphasis supplied.)

The words of Mr. Justice Black eloquently answered a similar contention in *Associated Press et al.* v. *United States, supra*, 1944, 326 U. S. 1, 20:

> "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to

the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."

The theory of equal justice under law does not admit to the proposition that there is one brand of justice for some people and a different brand for others. Publishers of newspapers must answer for their actions in the same manner as anyone else. A monopolistic press could attain in tremendous measure the evils sought to be prevented by the Sherman Anti-Trust Act. Freedom to print does not mean freedom to destroy. To use the freedom of the press guaranteed by the First Amendment to destroy competition would defeat its own ends, for freedom to print news and express opinions as one chooses is not tantamount to having freedom to monopolize. To monopolize freedom is to destroy it.

We have considered the many other claims of error presented by the appellants and find them to be repetitious or without substantial merit.

Affirmed.

A true copy.

Attest:

/s/ E. E. Koch,
Clerk, U. S. Court of Appeals,
Eighth Circuit.

(Seal)

APPENDIX B.

(Judgment.)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 15457 - - - - September Term, 1956.
Wednesday, January 23, 1957.

Emil A. Sees,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

January 23, 1957.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 985

THE KANSAS CITY STAR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 986

EMIL A. SEES, PETITIONER

v.

UNITED STATES OF AMERICA

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. No. 985, -37a) is reported at 240 F. 2d 643.

JURISDICTION

The judgments of the Court of Appeals were entered January 23, 1957 (Pet. No. 985, 1b; No. 986, B1), d petitions for rehearing were denied on March 13,

1957. The time for petitioning was extended by Mr. Chief Justice Warren on April 2, 1957, to May 12, 1957. The petitions for writs of certiorari were filed on May 10, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner Kansas City Star Company ("Star") was convicted of an attempt to monopolize and of monopolizing, and petitioner Sees (its advertising director) was convicted of attempting to monopolize, interstate trade and commerce in the dissemination of news and advertising by daily newspapers and radio and television broadcasting stations in metropolitan Kansas City, in violation of Section 2 of the Sherman Act. The following questions are presented:

1. Whether the District Court properly left it to the jury to decide whether the "relevant market" for determining Star's monopoly power over the dissemination of news and advertising in metropolitan Kansas City was limited to daily newspapers and radio and television stations in that area rather than, as petitioners contended, all other media engaged in the dissemination of news and advertising in that area.

2. Whether the Court of Appeals correctly held that, under all the circumstances shown by the record, the jury would have been justified in concluding that Star used the unit advertising rate and the forced combination subscription rate with the intent and effect of excluding competition.

3. Whether the District Court correctly charged the jury that, if Star had both monopoly power and the

intent to exercise such power, it might be convicted of monopolization whether or not it actually exercised the power.

4. Whether the District Court erred in defining attempt to monopolize as acts and practices done with the specific intent to achieve monopoly and which, if successful, "would be likely to accomplish monopolization", rather than as conduct which had a "dangerous probability" of achieving monopoly.

5. Whether petitioner Sees was denied a fair trial by being tried jointly with Star.

STATUTE INVOLVED

Section 2 of the Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. 2, commonly known as the Sherman Act, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT

On January 6, 1953, in the District Court for the Western District of Missouri, an indictment was returned (R. 3–14) charging petitioners with violating Section 2 of the Sherman Act. Petitioner Kansas City Star Company ("Star") publishes in Kansas

City, Missouri, a morning daily newspaper known as *The Kansas City Times* ("morning *Times*"), an evening daily newspaper known as *The Kansas City Star* ("evening *Star*"), and a Sunday newspaper known as *The Sunday Star* ("*Sunday Star*"). Star also owns and operates in that city a radio station and a television station. Petitioner Sees is Star's director of advertising, its treasurer, and a member of its board of directors.

The indictment charged that each petitioner had attempted to monopolize (Count I), and had monopolized (Count II), interstate trade and commerce in the dissemination, through daily newspapers of general circulation and radio and television broadcasting stations, of news and advertising in a four county area comprising metropolitan Kansas City.

After a lengthy trial, Star was convicted on both counts and Sees was convicted only of attempting to monopolize (Count I) (R. 283–284). The District Court, concluding that the offense of attempting to monopolize merged in the greater offense of monopolization (R. 327, 331), imposed a single fine of $5,000 upon Star, and a $2,500 fine upon Sees (R. 330–332). The Court of Appeals for the Eighth Circuit, in a detailed opinion (Pet. No. 985, 1a–37a), unanimously affirmed both convictions.

STAR'S DOMINANT POSITION IN THE MARKET

The Court of Appeals held (Pet. No. 985, 14a) that it was "apparent" that Star had a " 'dominant' position as to both circulation and advertising in the

daily newspaper field in Metropolitan Kansas City." The court pointed out (*id.*, 13a–14a) that, during the period covered by the indictment, Star's newspapers covered 95% of all households and represented more than 94% of total daily newspaper circulation in the metropolitan Kansas City area; and Star received 94% of total area advertising revenues for daily newspapers and 84% of such revenues for daily newspapers and radio and television stations.

From 1936 (the evidentiary cut-off date set by the trial court, R. 232, 234–5) to the return date of the indictment, the morning *Times* was the only morning newspaper of general circulation in metropolitan Kansas City. The only significant competition faced by the evening *Star* during that period came from the *Kansas City Journal-Post* (GX 3, R. 1219, 2543; R. 1909), the circulation of which was approximately one-third that of the evening *Star* (GX 3, R. 1219, 2543) and which ceased publication in 1942 (R. 1909). After 1942, Star's morning and evening papers were the only daily newspapers of general circulation in metropolitan Kansas City; the largest competing paper, the *Kansas City Kansan,* circulated only in the state of Kansas and had a total circulation in 1952 of 27,873, as contrasted with a circulation of 708,000 for the two Star papers (GX 187, R. 1863, 2781; R. 2017).

STAR'S PREDATORY AND EXCLUSIONARY PRACTICES

Petitioners do not discuss the extensive evidence upon which the jury based its verdicts. However, in

view of Star's contention (Pet. No. 985, p. 6) that the holding of Sherman Act violations rests on the fact that Star "as the largest daily newspaper in Kansas City, is in a 'dominant' position and that therefore, *ispo facto*, it has 'monopoly power,'" we believe it may be helpful to this Court to summarize the findings of the court below with respect to the various predatory and exclusionary practices by which Star acquired and maintained its monopoly power, and to set forth a few illustrative examples shown in the record.

The Court of Appeals held (Pet. No. 985, 14a) that the evidence showed that Star's two newspapers were "an indispensable advertising medium for many advertisers";[1] that Star "threatened" advertisers who used competitive papers with (1) "refusal to take their ads," (2) "loss of desirable position," (3) "having their credit cut off," (4) denial of news coverage to advertisers, and (5) discontinuing their

[1] A number of metropolitan Kansas City advertisers so testified. R. 388, 470, 795, 848, 900, 945, 1056, 1130, 1198–1199, 1298, 1415, 1463, 1570, 1573, 1658. The indispensability of these newspapers was further demonstrated by evidence that, following a warning from Star, these advertisers almost invariably consented to stop using competing local publications rather than endanger their advertising in Star's papers. R. 378–379, 438–439, 469–470, 706–708, 739–741, 755–758, 937–938, 1131–1132, 1135–1137, 1262–1263, 1298–1300, 1333–1335, 1365–1369, 1412–1415, 1462–1463, 1477–1478, 1505–1507, 1520–1521, 1573–1574, 1654–1655, 1663–1664; GX 137–144, R. 920, 921, 923, 925, 926, 927, 2735–2746. As one advertiser put it (R. 1415): "* * * when the Star is the bread and butter to our business or any other business it is, and it is important to us, you don't want to do anything that will endanger your position with them * * *."

ads, "unless The Star was given 'equal space' with competitive publications, regardless of how limited their circulation and the fact that 'equal space' in a large publication such as The Star would cost a great deal more than the same space in one of its small competitors" (*id.*, 15a–16a); and that Star had used its "dominant position * * * to dictate to advertisers how much of their advertising quota would have to be spent" in its papers (*id.*, 17a), and had used its dominant position as the owner of the only television station in the area from 1949 to 1953 "to aid in its newspaper advertising, making it clear in some instances that advertisers could not buy time" on such station "unless they also advertised in The Star papers" (*id.*, 18a).[2]

The court further held (*id.*, 21a–22a) that the record "could justify the jurors' conclusion" (1) that "the morning Times and evening Star were two separate newspapers with distinct and separate uses for advertisers" [and not, as petitioners contended, a single newspaper with 13 issues per week (*id.*, 19a–20a)],[3] and (2) that Star's unit advertising rate, under which classified and general advertisers were required to place their ads in both the morning *Times*

[2] In 1952, a Star representative, after tentatively agreeing to sell television time to a furniture company, pointed out that the company was not doing any newspaper advertising. When the company stated that it had no need therefor, it was told, "Well, in that case we don't have any time available for you at the present. What time is available is for our regular advertisers" (R. 1441, 1443).

[3] The evidence showed that the papers had different mastheads, and carried different news, editorials, comics, syndicated

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and the evening *Star*, was "used, notwithstanding the protests of advertisers, with the intent and effect of excluding competition." The court also ruled (*id.*, 22a) that the jury "could properly conclude" from the evidence that the effect upon the average subscriber of the *Star's* practice of requiring subscribers to "subscribe to the morning Times and the evening Star in combination with The Sunday Star for a total of thirteen papers per week for a single price" (*id.*, 18a) "is to foreclose the likelihood he will purchase other competing papers," with a "self-evident" "result on circulation of smaller papers in the area" (*id.*, 22a).

The court concluded (*id.*, 27a), "[f]rom an examination of the voluminous record, which * * * was printed in its entirety and submitted here,"[4] that it was

> perfectly clear that The Star's position in metropolitan Kansas City was of such dominance in the field in which it did business during the indictment years that it could be found by the jury that it possessed monopoly power, that it was an indispensable medium of advertising for some advertisers (See *Lorain Journal, et al.* v. *United States*, supra, 1951, 342 U. S. 143, 152), that its position gave

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columns, etc. (R. 1619–1624, 1767–1770). On the basis of such factors, the Audit Bureau of Circulation (a non-profit organization comprised of advertisers, advertising agencies and publishers, which audits newspaper circulation figures, R. 1589) listed the morning *Times* and the evening *Star* as different papers (R. 1598–1600).

[4] The printed record contains 3148 pages.

> it the power to exclude competition, and that it exercised such power for the purpose and with the intent so to do, within the meaning of the Sherman Anti-Trust Act

and that there was also "substantial" evidence "as to Sees' attempts to monopolize in the dissemination of advertising" (*id.*, 29a).

1. Threats of refusal to accept advertisements from, or otherwise to discriminate against, advertisers who used competitive publications

On numerous occasions, advertisers in the morning *Times* and/or the evening *Star* were threatened that Star would refuse to take their ads if they patronized competing papers (R. 460, 915, 1167–1172, 1234–1236, 1246–1263, 1322–1325, 1333–1335, 1572–1574). Thus, when theatre manager Hartman, who had daily ads in both papers, placed an ad in the competing *Journal-Post*, a Star advertising solicitor visited him and "told me, to get our ads out of The Journal-Post and not to put them in there" (R. 1333). Although Hartman withdrew the ad, the *Journal-Post* continued to run it without charge (R. 1333–1335), and the Star solicitor told him that "they were still unhappy with the ad in The Journal Post and that they were going to leave it out of the Kansas City Star and Times" (R. 1334). Hartman's ad was left out of the morning *Times* and upon inquiry he was told by the solicitor "that it would be back in the next day but to be sure and get my ad out of The Journal Post" (R. 1335). He did so (R. 1338).

Star also discriminated against advertisers who used competing publications by giving their ads an inferior position in the paper or "burying" them (R. 434, 438–442, 464–470, 610–611, 706–708, 716–718, 875–876, 913–914, 937–938, 941, 1048–1052, 1105–1107, 1356–1358, 1412–1415, 1428–1429, 1477–1478, 1483, 1533–1536, 1613–1614, 1652–1654, 1660–1664, 1667; GX 148–149, R. 1106, 1107, 2751–2755). The position which an ad occupied was important to advertisers (R. 713–719, 741–742, 782–783, 842–843, 878–879, 996, 1047–1049, 2273, GX 148, 149, R. 1106, 1107, 2751–2755). The purpose of this practice is revealed by Sees' comments with respect to a complaint by a regular Star advertiser about the poor position he had received in Star papers after he had used the competing *Journal-Post*. "Well, we will put his ad wherever we want to, bury it if we want to and teach him a lesson to stay out of the Post" (R. 588). When the advertiser renewed his protest later, Sees remarked, "Well, we will put him any place we darn please. We will teach him another lesson to stay out of the Post" (R. 590).[8]

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[8] The record contains a number of written notes from Sees to his advertising solicitors referring to the fact that regular advertisers in the Star papers had ads appearing in the competing *Journal-Post* and instructing "Let's get him out of there" (GX 121, 109, 120, 79, R. 1210, 545, 1208, 537, 2733, 2729, 2731, 2721). When a Star advertiser was also using the *Journal-Post*, Star advertising solicitors had a standing instruction to "get them out of the Journal into the Star exclusively." (R. 662.)

A typical instance of this kind of discrimination was described by the Court of Appeals as follows (Pet. No. 985, 16a):

> A dance studio manager testified that in 1952 he found the studio's ad missing from the usual position in The Sunday Star. One of the studio owners said that she had spent considerable time in search for it and then complained to The Star. In explanation of the change of position, a solicitor told her, "Well, I assumed that you didn't appreciate the place which you have been getting because I notice you have an ad in the News Press." The ad was withdrawn from the News Press and the following week the Studio ad reappeared in the customary position in The Sunday Star. [See R. 716–718, 937–938, 941.]

Another kind of threat made by Star against an advertiser who used a competing newspaper was described by the Court of Appeals as follows (*id.*, 17a):

> An example of the use of the dissemination of news to control advertising is illustrated in the instance of a big league baseball player who was a partner in a florist's shop in Kansas City. The florist shop also advertised in the Journal-Post. A Star solicitor informed one of the partners that The Star would discontinue publicizing the baseball player if the florist shop continued using the Journal-Post for advertising, Sees instructing a Star solicitor to tell them, "* * * to get out of the Journal-Post or he wouldn't get any sports, that he wouldn't get any cooperation from the sports desk on anything that he did in organized baseball." Sees

instructed the solicitor, "* * * Sees told me that if, that if I didn't get the ad in the Post to go out and tell Gleeson that if he knocked 100 home runs in the year his name would never appear in the paper outside of the box score and it got so hot to me that I told Gleeson to come down to The Star to get me off the hook with Mr. Sees," and the solicitor for The Star then told the advertiser, "I told him that they wanted him out of the Post and that if he didn't get out of the Post that he wouldn't get much sport write-up from the sport desks." [See R. 583–585, 1431–1433, 1520–1521.]

Gleeson discontinued running his florist shop ads in the *Journal-Post* (R. 585).

Similar threats were issued to other Star advertisers (R. 1130–1132, 1459–1463).

Star advertisers who used competing publications were threatened with having their credit cut off (R. 642–647, 649–651). Thus, when a Star advertiser placed a $20 ad in a throwaway sheet (R. 643) (as against a charge of $1,000 for comparable space in the morning *Times*, R. 644), a Star representative called on him "to collect the amount due for The Star inasmuch as he noticed we had money to throw away on these neighborhood throw sheets, and that he was going to have to put us on a current basis so far as further advertising was concerned" (R. 647). The advertiser never again used the throwaway (*ibid.*).

Advertisers who used competing publications were required to take the same space in the Star papers, at the substantially higher rates which the latter charged because of their much larger circulation (R.

579–582, 643–647, 1297–1300, 1356–1358, 1490–1491). Harold Price, the owner of an appliance company, testified that when he started using the *Journal-Post* in 1941, he was called to Star's office and ordered to explain this advertising and that, after hearing his explanation, Star's then advertising director, in Sees' presence, demanded that Price buy from Star the same amount of space he was using in the *Journal-Post*. When Price replied that he could not afford to do this because of Star's far higher rate, he was told that if he would not give Star equal space "that I should give all my advertising to The Kansas City Journal and give them a chance to prove to me that they could produce business for me or not" (R. 1298). After further protests, Price discontinued all advertising in the *Journal-Post* and continued to advertise in the Star papers (R. 1297–1300).

2. The forced combination advertising rate

Star required classified and general advertisers to place ads in both the morning *Times* and evening *Star*, even though such advertisers desired to use only one of the papers. A long list of advertisers in many fields (theatres, grocers, automobiles, appliances, real estate, etc.) testified that, because of the different advertising utility of the morning and evening papers, they wished to use only one, but that Star and Sees would not permit it (R. 648–649, 654–655, 773, 975, 1069, 1075, 1270–1271, 1504, 1546, 1569–1570, 1577–1578, 1585; GX 10, 157, R. 1220, 1578, 2551, 2758). As one advertiser explained (R. 1569–1570):

> We advertised in the Times because we have to advertise in it due to the Star's policy * * *

> I don't think that the ad that we run in the Times is of any value to us.

The forced combination policy was not applicable to local display advertising. Local grocers, who were thus free to select their advertising medium, placed more than 98.5% of their lineage in the morning *Times,* and only 1.5% in the evening *Star* (GX 200, p. 2, R. 2030, 2788). Western Auto Stores, which was classified by Star as a local advertiser, placed approximately 203,000 lines in the evening *Star* as against 6,000 lines in the morning *Times.* On the other hand, Western's competitor, Firestone Tire, was treated as a national advertiser and as such placed almost the identical lineage in both papers, even though the Firestone dealers objected strenuously to doing so (R. 505, 604–607, 2031, 2033).

Advertising experts testified that the forced combination rate operates to exclude competing advertising media from the market, since it uses up advertising budgets by compelling advertisers to spend more money in the combined papers than they would do if they had a free choice of media (R. 1059–1060, 1064, 1065). As a theater owner explained, "Well, the reason that we didn't advertise in the [Kansas City] Kansan was because most of our advertising budget was taken by the Star ads" (R. 1569–1570).

3. The forced combination subscription rate

Star followed a policy of requiring subscribers to purchase both the morning *Times* and the evening *Star,* even though they wanted only one of the papers

(R. 1948; GX 25, 26, 27; R. 1625, 2559, 2560, 2561–2562). The result of this practice, as an advertising expert testified (R. 1552), was that the subscriber would be unlikely to buy a second morning or evening paper. Furthermore, during the period 1936 to 1942, when the *Journal-Post* was competing with the evening *Star*, the weekly charge for the 13 editions (six morning, six evening, and one Sunday) was only 15 cents (GX 59, R. 1017, 2657; GX 73, R. 1022, 2709). As petitioners' own journalism expert, Dr. Frank Luther Mott, stated (R. 2261), under such circumstances "it is small wonder that competitors found the way difficult." Significantly, this price was raised to 20 cents in 1942 after the *Journal-Post* discontinued publication (GX 73, R. 1022, 2709), even though at that time Star's total operating costs were falling and its advertising income was rising (GX 190, 196, R. 1703, 2784, 2786).

ARGUMENT

At the outset, it should be emphasized that the lengthy record in this case is replete with extensive evidence showing, not only the possession of monopoly power, but also the specific intent to use that power and the actual exercise of that power through a variety of coercive and predatory practices. See Statement, *supra*, pp. 5–15. There is therefore plainly no basis for petitioners' apparent assertion (*e. g.*, Pet. No. 985, pp. 5–7, 10, 29) that their convictions rest solely on the mere fact that Star publishes the only daily newspapers of general circulation in the Kansas City area. To an unusually large extent, this case

turns on factual issues which the jury resolved against the petitioners. The court below, after a careful and exhaustive analysis, sustained the jury's verdict, and there is no occasion for further review.

1. Petitioner Star contends (Pet. No. 985, pp. 6–15) that the decision below, upholding its conviction of attempting to monopolize, and of monopolizing, the dissemination of news and advertising by newspapers and radio and television broadcasting stations in the metropolitan Kansas City area, is in "direct conflict" (*id.*, p. 8) with *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (the *Cellophane* case). It argues (*id.*, p. 9) that, "[u]nder the doctrine of the *Cellophane* case," various other news and advertising media "are competing in the same market" with the Star; and that the District Court "removed from the jury's consideration the question of the appropriate market by systematically excluding the very evidence which would have enabled the jury to pass upon this question" (*id.*, p. 12). Similarly, petitioner Sees contends (Pet. No. 986, p. 14) that the District Court, contrary to *Cellophane*, erroneously "defined the market as a matter of law, rather than submitting this issue to the jury as an issue of fact, and arbitrarily delineated the market" too "narrowly."

A. It should be noted, however, that *Cellophane* dealt with a charge of actual monopolization. And the *Cellophane* opinion itself points out (pp. 395–396) that the relevant market for determining monopoly power may be substantially narrower where an attempt to monopolize is involved rather than actual

monopolization. In the instant case, Star was charged with and convicted of both attempt to monopolize and monopolization, and the District Court specifically "adjudged that the defendant is guilty as charged and convicted" (R. 330). While the court treated the offenses as merging for sentencing purposes (R. 326), plainly the judgment of conviction on the attempt count was not thereby wiped out. "[A] judgment upon an indictment containing several counts, with a verdict of guilty upon each, will be sustained if any count is good, and sufficient in itself to support the judgment." *Whitfield* v. *Ohio,* 297 U. S. 431, 438; *Hirabayashi* v. *United States,* 320 U. S. 81, 85. Since the $5,000 fine imposed on Star was authorized on either count, the judgment must stand if the conviction of attempt to monopolize was valid. We submit that it clearly was.

As an illustration of the narrower scope of the market in cases of attempts to monopolize, the Court in *du Pont* cited (note 23, pp. 395–396) *Lorain Journal* v. *United States,* 342 U. S. 143. We believe that, insofar as the issue of "relevant market" is concerned, that case fully supports the Star's conviction of attempt to monopolize. There this Court upheld a district court decision that the publisher of the only daily newspaper in Lorain, Ohio, had attempted to monopolize the dissemination of news and advertising in that city. The *Journal* sought to drive a competing radio station off the air by tactics similar to those used by the Star. It "refused to accept local advertisements in the Journal from any Lorain Coun-

ty advertiser who advertised or who appellants believed to be about to advertise" over the radio station (p. 148). This Court pointed out (p. 152) that the paper's "substantial monopoly" in Lorain, together with its coverage of 99 percent of the families there, made it "an indispensable medium of advertising for many Lorain concerns." It held (p. 154) that "a single newspaper, already enjoying a substantial monopoly in its area, violates the 'attempt to monopolize' clause of § 2 when it uses its monopoly to destroy threatened competition." Yet obviously the *Journal*, competing in an extremely narrow market, was subject to the same kind of competition from other news and advertising media in the area that petitioners point to in the instant case. Cf. *United States* v. *E. I. du Pont de Nemours & Co.*, No. 3, this Term, decided June 3, 1957, slip opinion, pp. 6–9; *Greenspun* v. *McCarran*, 105 F. Supp. 662 (D. Nev.).

B. In any event, with respect to Star's conviction of monopolization, the trial court properly left it to the jury to determine, under proper instructions, whether, in view of the competition of other media, Star had monopoly power in the market where it did business.* The court, after defining monopoly power as the power "to exclude actual or potential

* Petitioner Star contends (Pet. No. 985, p. 12) that the District Court "systematically" excluded "the very evidence which would have enabled the jury to pass upon this question" of "the appropriate market." The only evidence which the court completely excluded, however, dealt with billboards and national magazines. Petitioners offered no evidence that there was any "cross-elasticity of demand" between these media and Star's newspapers,

competitors from any part of the trade or commerce among the several states, provided that he or they have the intent or purpose to exercise that power" (R. 2444), pointed out to the jury that "[t]he Government contends that the relevant market which the defendants are charged with attempting to monopolize and to have monopolized in the metropolitan area is the dissemination of news and advertising in a four county area by daily newspapers along with radio and television broadcasting stations" (R. 2446); that "[o]n the contrary, the defendants contend that the relative or comparative market is broader than that encompassed by the Government, that is, the daily

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in the sense that these media were "effective substitutes" for Star because they were "reasonably interchangeable by consumers for the same purposes" (*Cellophane* case, *supra*, p. 395). On the other hand, a large number of metropolitan Kansas City advertisers repeatedly testified that they were primarily dependent on Star (R. 388, 470, 795, 848, 899, 945, 1056, 1130, 1198–1199, 1298, 1415, 1463, 1658), and that they agreed to stop using various limited circulation local publications rather than endanger their advertising with Star (R. 378–379, 438–439, 469–470, 706–708, 739–741, 755–758, 937–938, 1131–1132, 1135–1137, 1262–1263, 1298–1300, 1333–1335, 1365–1369, 1412–1415, 1462–1463, 1477–1478, 1505–1507, 1520–1521, 1573–1574, 1654–1655, 1663–1664, 2735–2746; GXs 137–144).

"Illegal power must be appraised in terms of the competitive market for the product" (*Cellophane* case, p. 393). The Court of Appeals did not err in concluding (Pet. No. 985, pp. 24a–25a) that, "with due regard to the realities of newspaper advertising," neither national magazines nor billboards were shown by the record to be "market alternatives" or "effective substitutes" for Star. Indeed, Star itself made such a distinction when it compelled an advertiser to discontinue buying space in the *Kansan* and other local media, while at the same time disavowing any objection to his advertising in a national magazine, *The Ladies Home Journal* (R. 468–469).

newspapers and the radio and television broadcasting stations, and should include weekly newspapers, magazines, billboards, car cards, handbills, religious and other publications which are published, created or produced in the defined area" (*ibid.*); and that it was for the jury to "determine for themselves the factual situation as to what is and what is not in competition in the dissemination of news and advertising within the metropolitan area" (R. 2447). The court further charged that "[m]onopolization need not extend to all substitute or alternative advertising media or dissemination of news" (R. 2446), and it instructed the jury that it "may take into consideration their common experiences in the affairs of life * * * in determining the question of whether or not the defendant Star was in a dominant or monopolistic position" (R. 2446–2447).

This charge, we believe, fully complied with the principles enunciated by this Court in the *Cellophane* case. There this Court pointed out (351 U. S. at 404) that "[t]he 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration," and that "[i]n considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal" (p. 395). On that basis, the Court

affirmed the trial court's holding that the relevant market involved was not cellophane, but the broader area of flexible packaging materials, in which du Pont did not have a dominant position. It did so "[o]n the findings of the District Court" (p. 404) that cellophane and other flexible packaging materials had a "very considerable degree of functional interchangeability" (p. 399), and that there was a "'[g]reat sensitivity of customers in the flexible packaging markets to price or quality changes,'" which "prevented du Pont from possessing monopoly control over price" (p. 400).

In the instant case, however, there was extensive evidence (see *supra,* note 1) that Star's newspapers were, as the court below stated (Pet. No. 985, 14a), "an indispensable advertising medium for many advertisers." There was thus posed a factual question for the jury, namely, "what is and what is not in competition in the dissemination of news and advertising within the metropolitan area," and the jury resolved it against petitioners and for the Government. In the language of *Cellophane,* the jury concluded, on the basis of the evidence, that Star's papers were not "reasonably interchangeable by consumers for the same purposes" with the other media upon which petitioners relied.

As this Court has noted, "[t]he advertising industry and its customers * ** * markedly differentiate between advertising in newspapers and in other mass media." *Times-Picayune Publishing Co.* v. *United*

States, 345 U. S. 594, 612, note 31. The Court there also warned (*ibid.*) that the circle marking the boundaries of the "relevant market" "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." Applying this standard, the court below correctly held that the evidence in this case justified the jury's finding that Star had monopoly power over the dissemination of news and advertising through newspapers and broadcasting stations in metropolitan Kansas City, notwithstanding the existence in the area of other media which, to varying degrees, also were engaged in that business. Cf. *United States* v. *E. I. du Pont de Nemours & Co.,* No. 3, this term, decided June 3, 1957, slip opinion, pp. 6–9.

2. Petitioners contend (Pet. No. 985, pp. 16–23; Pet. No. 986, pp. 10–13) that the court below held that use of the unit advertising rate was a *per se* violation of the Sherman Act (No. 985, pp. 5, 16; No. 986, p. 13), and that this ruling conflicts with *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, and *Syracuse Broadcasting Corp.* v. *Newhouse,* 236 F. 2d 522 (C. A. 2). Star argues (Pet. No. 985, p. 18) that in *Times-Picayune* "this Court held that the use of the unit rate by a sole trader did not constitute * * * an attempt to monopolize under Section 2," and that "[*a*] *fortiori,* it cannot, by itself, constitute a consummated monopolization under Section 2 of the Sherman Act." Star also makes a similar ar-

gument (*id.*, 6, 23–25) with respect to the holding below on the forced combination subscription rate.

In *Times-Picayune*, however, this Court made it clear that it was not adjudicating the legality of the unit rate system generally, but was holding only that the trial court's finding that the system *as there used* constituted an attempt to monopolize could not stand because the "record cannot bear out the specific intent essential to sustain an attempt to monopolize under §2" (345 U. S. at 627).[7] The Court stated (pp. 627–628, emphasis added):

> We conclude, therefore, that *this record* does not establish the charged violations of § 1 and § 2 of the Sherman Act. *We do not determine that unit advertising arrangements are lawful in other circumstances or in other proceedings.* Our decision adjudicates *solely* that *this record* cannot substantiate the Government's view of this case.

As the court below correctly held (Pet. No. 985, p. 21a), "The *Times-Picayune* case was, in the last analysis, determined on the basis of a failure of proof," and tying arrangements, such as the unit advertising rate and the forced combination subscrip-

[7] Although proof of specific intent to monopolize is necessary to establish an attempt to monopolize (*Swift & Co.* v. *United States*, 276 U. S. 311; *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 532), such a showing is not required to prove monopolization itself. "It is sufficient that a * * * monopoly results as the consequence of a defendant's conduct or business arrangements." *United States* v. *Griffith*, 334 U. S. 100, 105.

tion, "must be judged amidst the circumstances and surroundings in which they operate."[8]

In submitting this case to the jury, the trial court fully explained the significance of intent under Section 2. It repeatedly pointed out (R. 2443–2444, 2447) that an attempt to monopolize requires a "specific intent" to obtain a monopoly, carefully defined such intent (R. 2447–2448), and contrasted it with the "general intent" which is sufficient to support a charge of monopolization and which "is a fact to be proved like any other fact, by acts, conduct and circumstances" (R. 2448). The court charged that "if you find that the defendants used the forced combination arrangement

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[8] Similarly, the *Newhouse* case does not enunciate any general rule with respect to the legality of the unit advertising rate, but turns on the particular facts there involved. In *Newhouse*, a radio station in Syracuse, New York, brought a private antitrust treble damage action against the publishers of the only two newspapers in town (and a competing radio and television station) alleging, *inter alia*, that use of the unit advertising rate constituted both a conspiracy in restraint of trade (in violation of Section 1), and an attempt to monopolize and actual monopolization (in violation of Section 2). The District Court granted summary judgment in favor of the defendants on both charges. The Court of Appeals affirmed the ruling as to the Section 2 claim, on the narrow ground that the "undisputed evidence" showed that the defendants' "share of the total advertising revenue" of newspapers and broadcasting stations in the Syracuse market "is too low to warrant any inference of monopolization by defendants or any attempt to monopolize" (236 F. 2d 522, 525–526). However, the court reversed the ruling on the Section 1 claim, since it could not say, on the basis of the "confused and cumbersome" record before it, that the plaintiff could not at the trial "prove that, were it not for the existence of the unit arrangement, persons advertising their products in the Syracuse area would devote more of their advertising funds to plaintiff's competing medium" (p. 526).

between two newspapers,* and that the papers or either of them were dominant, and that *such practice was intended to achieve or maintain monopoly,* then I instruct you that you would be justified upon that evidence alone in returning a verdict of guilty, or that you may consider that evidence in conjunction with all other evidence before you, and upon being convinced beyond a reasonable doubt that defendants attempted to monopolize and monopolized in the dissemination of news and advertising in the area as I have already discussed, return a verdict of guilty as to either or both counts" (R. 2456, emphasis added). The court gave a similar charge with respect to the forced combination subscription rate (R. 2456–2457).

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*The court previously had told the jury that they would have to determine the "fact" (R. 2455) whether, as the Government charged (R. 2454), the morning *Times* and the evening *Star* "are separate and distinct newspapers" (R. 2453, 2454), or whether, as the defendants contended, "each of the papers is simply a separate edition of the same papers" (R. 2454–2455).

Petitioner Star contends (Pet. No. 985, pp. 20–22) that "The Star is a single, around-the-clock newspaper," and that the *Times-Picayune* case compels that conclusion. But the rationale of *Times-Picayune* was not, as petitioner contends (Pet. No. 985, p. 20), that the morning and evening papers there involved were but a single paper, but that "nothing in the record suggests that advertisers viewed the city's newspaper readers, morning or evening, as other than fungible customer potential" (345 U. S. 594, at 613). In the instant case, however, there was considerable evidence that advertisers had distinct preferences for one Star paper or the other, but that the unit rate system prevented them from making a free choice between the papers. See Statement, *supra*, pp. 13–14. The Court of Appeals correctly held (Pet. No. 985, p. 21a) that "a question of fact was raised" with respect to whether Star published one or two papers, and that "it was properly left for the determination of the jury."

The competitive impact of the unit advertising rate and the forced combination subscription, and the intent with which Star employed these practices, thus were left for the jury to determine. The court below fully and carefully reviewed the evidence, and concluded that, "[u]nlike *Times-Picayune,* but comparable to the situation presented" in the *Lorain Journal* case (*supra,* p. 17),

> we think the record here could justify the jurors' conclusion that the morning Times and evening Star were two separate newspapers with distinct and separate uses for advertisers; that each was dominant in its own field; that together they dominated the market both morning and evening; and that *the unit advertising method was used, notwithstanding the protests of advertisers, with the intent and effect of excluding competition.* As to the forced combination rate, we think the jurors could properly conclude that the effect upon the average subscriber who must take thirteen papers a week is to foreclose the likelihood he will purchase other competing papers. The result on circulation of smaller papers in the area is self-evident. We find no error in the court's submission of these issues to the jury. [Pet. No. 985, pp. 21a–22a; emphasis added.]

We submit that the foregoing rulings by the Court of Appeals on these factual questions were correct, and that their validity presents no question of general importance justifying further review by this Court.

3. Petitioner Star further contends (Pet. No. 985, pp. 26–28) that the court below erred in approving

the District Court's charge that Star might be convicted of monopolization if it had both monopoly power and the intent to exercise such power, whether or not such power "actually be exercised" (R. 2444). It argues that, although non-exercise of monopoly power does not preclude a finding of monopolization where a combination or conspiracy to monopolize is involved, a different rule should apply in cases of monopoly by a single trader.

The decisions of this Court, however, draw no such distinction. In *American Tobacco Co.* v. *United States*, 328 U. S. 781, the Court held (p. 809) that "actual exclusion of competitors is not necessary to" "the crime of monopolization in these cases under § 2 of the Sherman Act." While the case involved a combination and conspiracy to monopolize, the holding that proof of actual exclusion of competitors is unnecessary did not rest on that ground, but on the broader rationale that "the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so" (p. 811).

In *United States* v. *Griffith*, 334 U. S. 100, this Court, citing *American Tobacco*, expressly stated (pp. 106–107, footnotes omitted):

> Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to at-

> tempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 of the Act is aimed, *inter alia*, at the acquisition or retention of effective market control.

See also *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 427, 428–429, 432 (C. A. 2); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 297, 342–343 (D. Mass.), affirmed *per curiam*, 347 U. S. 521.

Thus, even assuming that it were necessary to consider the validity of Star's conviction of monopolization (see *supra*, p. 16), the court below (Pet. No. 985, pp. 33a–34a) was clearly correct in holding that, "[i]f the essential elements of the offense of monopoly are present, the law applies, whether the prosecution is against one or several acting in concert."

4. Petitioner Sees, who was convicted only of attempt to monopolize, contends (Pet. No. 986, pp. 16–18) that the trial court improperly defined that offense. The court told the jury that an attempt to monopolize "means the employment of methods and practices which are utilized for the specific purpose and with the specific intent to achieve or build a monopoly, and which, if successful, *would be likely to accomplish monopolization*" (R. 2443, 2444, emphasis added). Sees argues that *Swift & Co.* v. *United States*, 196 U. S. 375, and *American Tobacco Co.* v.

United States, 328 U. S. 781, as well as decisions of other courts of appeals, establish that an attempt to monopolize requires proof of a "dangerous probability" that the attempt will succeed, and that the "likely to accomplish" language used by the district court in the instant case was therefore erroneous and in conflict with those cases.

We submit, however, that the Court of Appeals correctly concluded (Pet. No. 985, p. 32a) that "[t]he phrase 'dangerous probability' carries with it no substantially different meaning to the average person than the phrase 'likely to accomplish' ", and that the court's charge placed no "lesser burden on the government than that contained in the definition approved by the Supreme Court in the *American Tobacco Co.* case." As the court pointed out (*ibid.*): "[t]rial courts are not bound to use the specific language contained in requested instructions or in instructions approved by appellate courts, but may use their own language so long as it conveys to the jurors proper understanding and meaning. Attempts to commit crime have been defined by many courts in many ways. * * * Here the trial court's requirement of a finding of 'specific intent' plus likelihood of accomplishment is certainly tantamount to the 'dangerous probability' in the definition relied on by Sees. In the *American Tobacco Co.* case, the Supreme Court was merely approving the trial court's definition but was not saying that that exact language had to be used in all such instructions."

5. Petitioner Sees further argues (Pet. No. 986, pp. 18–23) that he was denied a fair trial. He contends that his rights were prejudiced by being tried jointly with Star (*id.*, 7–8, 19), and that the trial court's instructions to the jury failed to differentiate between the evidence admissible as to him and that admissible only as to Star (*id.*, 9, 19–21). These contentions were fully considered and rejected by the Court of Appeals.

As that court noted (Pet. No. 985, pp. 9a–11a), it is well settled that the determination "whether the defendants should be tried together or severally" is a matter "within the sound discretion of the trial judge * * *." *Opper* v. *United States,* 348 U. S. 84, 95. Here, as in the *Opper* case, "there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled." For, as the court below pointed out (Pet. No. 985, pp. 11a–12a), "the [trial] court repeatedly throughout the trial admonished the jury that certain evidence received was not applicable to Sees and carefully charged the jury that Sees could be held responsible only for acts performed by him or under his direction." The fact that the jury acquitted Sees on the charge of monopolization, while at the same time finding Star guilty on that charge, is the short answer to Sees' contention (Pet. No. 986, p. 19) that it was "impossible for the jury rationally to segregate and consider against petitioner only that evidence competent against him." The court below correctly concluded that the "refusal of the trial court to grant

Sees' motion for severance was a valid exercise of discretion * * *."[10]

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no other reason appears for review by this Court. It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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[10] Sees further contends (Pet. No. 986, p. 15) that his conviction was not based on his personal conduct, but upon the "erroneous application of the civil doctrine of imputed or vicarious liability." The evidence upon which Sees' conviction rests was fully reviewed by the Court of Appeals (Pet. No. 985, pp. 12a–27a) and it concluded (*id.*, 30a) that the record fully "justified the jury's verdict against him under Count I." The correctness of this factual ruling does not call for further review by this Court.

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IN THE

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THE KANSAS CITY STAR COMPANY,
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v.

UNITED STATES OF AMERICA,
Respondent.

EMIL A. SEES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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REPLY BRIEF FOR PETITIONERS.

The Government brief in opposition to the petitions for certiorari herein fully confirms the contention of the main petitions—and the worst fears of the newspapers of this country.

The Government squarely takes the position that newspapers are not "reasonably interchangeable" with other mass media and that, when charged with monopolization, newspapers are properly prohibited even from submitting proof of the competitive onslaughts of other mass media.

Inescapably, under the Government theory, every newspaper which is the only newspaper in its town has monopoly power and exists at the sufferance of the Attorney General. This fearful power is too great a weapon to place in the hands of any administration. We do not believe that this Court is prepared to permit any such result.

Even the Government shows understandable reluctance to state this proposition baldly. It seeks to blur the issue with four contentions:

1. Although petitioners' market evidence was excluded even from consideration by the jury, the Government argues that the District Court somehow "left to the jury" the decision on the question of the appropriate market.

2. The Government seeks to pass off this case as just another "predatory acts" case although, concededly, the charge of the District Court permitted the jury to convict even if it found in petitioners' favor on every act and incident alleged by the Government.

3. The Government omits any reference to the major areas of its case which were totally unproved, including the charge of monopolization of news and the vital issue of the absence of any vestige of market control over radio and television.

4. Finally, the Government is driven to contend that, even if the Star was erroneously convicted of monopolization, review should still be denied it because of the verdict on attempted monopolization—which concededly merged in the offense of monopolization and on which no sentence was imposed and no judgment entered and from which no appeal could have been taken.

The District Court ruled on the appropriate market as a matter of law, excluding from the jury's consideration the great bulk of petitioners' evidence.

Inexplicably, the Government states the first question presented as whether the District Court "properly left it to the jury to decide" the relevant market (Gov't Br. p. 2).

The simple and inescapable fact is that that is exactly what the District Court did not do; instead, it deliberately and systematically excluded petitioners' evidence on this point.

The jury was not permitted to pass on the appropriate market, either product-wise or geographically.* Similarly, petitioners' evidence of the mobility of demand between the competing mass media was systematically excluded by the court (DX 78-82; R. 3079-87, R. 2221-32).

Under these circumstances, with most of petitioners' market evidence never before the jury, it is utterly futile for the Government to claim that the jury concluded that the Star was not "reasonably interchangeable" with other media. (See Gov't Br. p. 21)

The District Court's exclusion of this evidence was particularly prejudicial in view of its mis-definition of the crime of monopolization. The District Court's charge watered down beyond recognition the definition of that offense by equating "monopoly" with "dominance" and "dominance" with being "the biggest" and by instructing the jury that monopoly power consists of the power to secure a "competitive advantage" or to impose a "handicap" (R. 2444-45, 2446, 2447, 2453-57).

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* National magazines excluded (DX 83-90; R. 3089-3101; R. 1870-71, 2231-46, 2272); certain radio stations excluded (R. 2105-06, 2114-20, 2130-34, 2137, 2142, 2145, 2151-52, 2154-56, 2332-33); outdoor advertising excluded (R. 2364-66); certain daily and weekly papers excluded (DX 44, 45, R. 2911-27; R. 1883-85); geographical market evidence excluded (R. 1883-85, 2110, 2120-23, 2165-66).

One final point should not be overlooked. The Government purports to view with surprise what it terms the "Star's contention" that the conviction herein rests on a finding that "dominance" in the daily newspaper field is the equivalent of monopoly power. (Gov't Br. pp. 5-6.)

Such purported surprise ill becomes the Government, which tried this case and opposed the appeal to the Eighth Circuit on precisely that ground. As merely one example, in its brief to the Eighth Circuit the Government listed as one of the major pillars of its case:

> "Evidence as to the overwhelmingly dominant position of the Star in the daily newspaper field in Metropolitan Kansas City, *a dominance which supplied the Star with the power to monopolize;*" (emphasis supplied) Gov't Br. to the Eighth Circuit, p. 64.

Even in its present brief in opposition, the Government, as it has at every stage of this litigation, lays great stress on the Star's "dominant position" and its supposed "indispensability" to certain local advertisers. *These contentions are equally applicable to every newspaper which is the only newspaper in its town—92% of the newspapers in this country.*

The individual acts and incidents were not adjudicated adversely to petitioners. Such acts are irrelevant to the questions presented on this appeal.

In an apparent attempt to divert attention from the crucial legal issues presented by this petition, the Government devotes almost half its brief to a belaboring of individual acts and incidents which have nothing to do with this petition.

The Government writes its brief as though the jury had found petitioners guilty of every individual act as to which the Government introduced evidence in the course of a trial which consumed over 3,000 pages of printed record. The Government so argues although the incidents were sharply controverted and the jury may have decided in petitioners' favor on any—and, indeed, on all.

Under the charge, the jury could have convicted even if it fully absolved petitioners of any of the controverted incidents charged by the Government since

1. The jury was permitted to convict even if it found that petitioners' claimed power was wholly unexercised and

2. The jury was permitted to convict on the basis of the existence of the unit advertising rate or the unit subscription rate, in and of themselves, without regard to any other evidence in the case.

Where, as here, the trial judge offers the jury a variety of grounds on which it can convict, it is not enough to show that evidence exists to support some particular ground on which the jury conceivably could have gone. If any one of the alternatives offered in this case by the District Court in its confused and confusing charge was incorrect or misleading, then petitioners' conviction must be reversed.

The question is not what a judge might have decided had he been sitting as the trier of fact. The question is whether the jury was so charged by the judge that it could have convicted on grounds which are erroneous as a matter of law.

Thus, if the trial court wrongly determined the market or improperly defined the crime of monopolization, the convictions cannot stand, regardless of the existence or nonexistence of particular incidents.

The erroneous judgment of monopolization is not saved by the verdict with respect to attempted monopolization.

In apparent recognition of the vulnerability of the conviction for monopolization, the Government argues strenuously that, even if that conviction were erroneous, it nonetheless should be permitted to stand because the Star was also charged with an attempt to monopolize and the jury found against petitioner on that count.

The Government slurs over the fact that, as the District Court held, the attempt count merged into the monopolization count, that no sentence was entered on the attempt count, and that no appeal could thereafter have been taken on that count.*

On this point the record is so clear that it is difficult to fathom the Government's argument. For example, in ruling upon petitioners' motion to set aside the verdict, the District Court held:

> "It is my own conclusion that defendant cannot be penalized for both the attempt to monopolize, and of monopolization, although each is made a separate offense by the act. * * *
>
> "It is my conclusion, as it has been the conclusion of other courts under similar circumstances, that the offense of attempting to monopolize merged in the greater offense of monopolization, and permits but a single penalty. American Tobacco Co. *vs.* U. S., 328 U. S. 781**; U. S. *vs.* Shapiro, 103 F. 2d 775." (R. 326-27.)

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* The Government cites in support two cases where concurrent sentences were given on separate and independent counts, any one of which sufficed to uphold the sentence. Neither case in any way involved merger and neither has the remotest relevance to the question here presented.

** In *Tobacco*, as here, no appeal was prosecuted from the attempted monopolization count.

At sentencing, the District Court further reinforced its prior ruling by stating:

> "I am going to impose the *maximum* penalty upon the Star. It is not a large sum of money but I am going to impose the maximum penalty. The defendant Star will be fined the sum of $5,000.00.
>
> "The defendant Sees, whatever acts he committed were committed for and on behalf of The Star. If The Star can only be fined $5,000.00, and that of course is the *maximum,* I cannot feel that the defendant Sees should be fined an amount equal to The Star." (emphasis supplied) (R. 2517.)

Patently, if the "maximum penalty" (then $5,000 for each violation) was imposed upon the Star, sentence was imposed only upon the monopolization count (Count II). There having been no sentence imposed upon the attempted monopolization count (Count I), no final judgment was entered on that count and, accordingly, there was nothing from which the Star could have prosecuted an appeal. See *Berman* v. *United States,* 302 U. S. 211, 212 (1937); Rule 37(a)(2), Fed. Rules Crim. Proc.

If the Government is really serious in urging that an erroneous conviction should be upheld on appeal because of the existence of a merged, non-appealable conviction, this question alone would seem sufficiently important to the administration of criminal law to require review by this Court.

The fact that the Government is plainly in error on the procedural point should not be permitted to obscure the further fact that the Star's conviction of attempted monopolization was equally erroneous and was vitiated by the same errors which vitiate the conviction for monopolization. Whether the offense charged is attempted or consummated monopolization, the defendant has the unqualified

right to show the existence of effective competition, and denial of this right is equally reversible error in either instance.

The District Court permitted the jury to convict on the existence of the unit advertising rate or the unit subscription rate alone without reference to any other evidence in the case.

The Government states the question presented as to the unit advertising rate and the unit subscription rate as whether "under all the circumstances shown by the record" the jury would have been justified in convicting on the basis of either of these two practices (Gov't Br. p. 2).

This statement is quite misleading. The District Court's charge on this point (see Gov't Br. p. 25) makes obvious that the jury was given two clear alternatives with respect to each of the unit rates. It was permitted to convict:

> —either on the basis of the evidence relating to the unit rate alone
>
> —or, alternatively, on the basis of the evidence relating to the unit rate "in conjunction with all other evidence" (R. 2456-57).

By completely ignoring the first half of this charge, the Government's entire discussion of the issue relating to the unit rates utterly begs the question. The first portion of the charge permitted the jury, without looking at a single fact in the case other than the unit advertising rate or the unit subscription rate, to convict petitioner of monopolization. In so doing, it constituted reversible error.

The District Court so charged in the absence of any evidence that either unit rate had been adopted or maintained for any monopolistic purpose, and in the face of overwhelming evidence that the adoption and maintenance of both

unit rates were entirely motivated by legitimate business purposes.

On the further question whether the Star constituted one or two papers, the Government brief, if anything, points up the irreconcilability of the decision below with *Times-Picayune.*[*]

This case presents for the first time the question whether a single trader can be convicted for unexerted monopoly power.

The Government unqualifiedly takes the position that the decisions of this Court in *Griffith* and *Tobacco* (holding that a conspiracy to monopolize violates Section 2 of the

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[*] Thus, at page 7, n. 3, the Government purports to prove its case by stating that the issues published by the Star "had different mastheads and carried different news, editorials, comics, syndicated columns, etc." The finding of the lower court in *Times-Picayune*, reversed as a matter of law by this Court, was virtually verbatim: that the Times-Picayune and States had "an entirely different and distinctive make-up and appearance" and contained "different features, syndicated columns, editorial cartoons, comics, and news." *United States* v. *Times-Picayune Publishing Co.*, 105 F. Supp. 670, 673 (E. D. La. 1952).

The Government also relies on the fact that the Audit Bureau of Circulation listed the Star's two issues as different papers. But in *Times-Picayune, the defendant itself* submitted to the ABC "separate statements for the Times-Picayune, morning and Sunday, and the States, evening". *Ibid.*

The further argument of the Government that *Times-Picayune* is inapplicable because certain of the Star's "advertisers had distinct preferences for one Star paper or the other" (Gov't Br. p. 25, n.) ignores the fact that in *Times-Picayune* "a number of classified advertisers" and "a great number" of general advertisers expressed similar preferences. 105 F. Supp. at 674-75, 676.

The Government also wholly misconceives the *Newhouse* case (Gov't Br. p. 24, n.). There, the court followed *Times-Picayune* in rejecting application of the rationale of the tying cases in determining the legality of unit advertising rates, holding that such practice by the publisher of the only morning and evening newspaper issues in the city did not violate Section 2. It further held that the legality of the practice under Section 1 must be measured with reference to the general prohibitions of that section, not by the rationale of the tying cases. 236 F. 2d at 525-26.

Sherman Act even though the monopoly power remains unexerted) are equally applicable to sole traders. It does so despite the fact that, in *Tobacco,* this Court specifically limited its ruling to conspiracy cases, stating:

> "It is therefore only in conjunction with . . . a combination or conspiracy that these cases will constitute a precedent." *American Tobacco Co.* v. *United States,* 328 U. S. 781, 798 (1946).

The Star is the first sole trader ever convicted under a charge permitting conviction for unexerted monopoly power. If that is the law, it represents a change in the antitrust laws of major magnitude. If that is not the law, the bar and bench of this country should be so advised and this conviction must be reversed.

The Government seeks to expand vastly the scope of the crime of attempted monopolization by diluting it to a mere "likelihood".

With respect to Sees' petition, the Government, in two pages, lightly dismisses the new definition of the crime of attempted monopolization contained in the charge of the District Court by contending that the phrase "dangerous probability" of monopolization means substantially the same to the average person as the phrase "likely to accomplish monopolization". Gov't Brief, pp. 28-29. Here, too, a change of far-reaching implications is being smuggled into the antitrust laws with blithe assurances that nothing really is happening.

If a defendant may properly be convicted where a mere likelihood of monopolization exists, the scope of the crime of attempted monopolization is stretched beyond any concept contained in prior cases and loses all touch with the law of attempt in every other area of criminal law.

Petitioner Sees was denied a fair trial.

To the substantial showing in petitioner Sees' petition of the fatal prejudice to him of a joint trial (Sees' Petition, pp. 7-9, 18-21), the Government gives the "short answer" that the fact that the jury convicted him on only one count while convicting the Star on two is somehow proof that he received a fair trial (Gov't Br. p. 30).

It is obvious that the jury's verdict may be evidence of nothing more than complete confusion on the part of the jury. The same argument now advanced by the Government—that a jury verdict differing as to different defendants was proof of the jury's separate consideration of each defendant—was rejected by this Court in *Kotteakos* v. *United States,* 328 U. S. 750 (1946).

Rather than carefully admonishing the jury as to the evidence applicable to Sees, as the Government suggests (Gov't Br. p. 30), the District Court actually thrust upon the jury the function of ruling on the admissibility of the evidence by permitting the jury to determine whether or not the evidence was connected with Sees. *In at least 135 instances* the District Court sustained Sees' objections "unless connected up" and the jurors were consequently unable to differentiate as to the evidence admissible solely as to Sees during the lengthy and complex trial of this case (Sees Petition, pp. 7-8, 19).

To compound this error, the District Court in its final instructions erroneously submitted against Sees all the charges and all the evidence with one single exception, even though only a small portion thereof could be applicable to Sees (Sees Petition, pp. 19-21). If the jury followed the District Court's instructions, Sees was subject to conviction on the basis of virtually any and every act referred to in the court's charge (except the unit subscription rate prac-

tice), even though he had nothing to do with most of the charges. This was clearly reversible error.

The Government makes virtually no attempt to defend the further fatal error in Sees' conviction—the basing of guilt not upon personal conduct, but upon the civil doctrine of imputed liability. Gov't Br. p. 31, n. For example, the District Court instructed that Sees could be convicted on the basis of the unit advertising rate alone (R. 2452-56), although Sees did not establish and could not alter this practice.

Further, Sees had no connection with or supervision over news gathering or dissemination or any aspects of radio or television; he was concerned solely with newspaper advertising (R. 2267-69). Yet he was convicted of attempting to monopolize the dissemination of news and advertising through newspapers, radio and television—a conviction made possible only by the failure of the courts below to require proof of the essential elements of the offense and by imputing to Sees criminal liability for the acts of others.

This is not a mere factual ruling, as the Government suggests (Gov't Br. p. 31 n.), but a matter of first importance in the administration of federal criminal law in protracted antitrust trials. The formulation and application of standards of procedure and evidence in trials of this type is essential, especially where the liberty and the reputation of individuals are involved.

Conclusion.

The decision below presents a serious and immediate threat to the independence of the press of this country—a threat which is made more real by the position frankly espoused by the Government in its brief.

The decision below is irreconcilable with the *Cellophane* and *Times-Picayune* decisions and charts—badly and erroneously—broad new areas of antitrust laws that have never before been explored.

It is respectfully submitted that the national interest in an independent and unintimidated press and the necessity of resolution of crucial questions of antitrust law of sweeping applicability both require that the petitions for writs of certiorari should be granted.

Respectfully submitted,

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